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ELECTRONIC MAIL MEMO

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To: Assistant Secretary, Indian Affairs*
Director, Fish and Wildlife Service
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Director, Minerals Management Service
Director, National Park Service
Director, Bureau of Land Management
Director, Bureau of Surface Mining
Commissioner, Bureau of Reclamation

From: Team Leader, Natural Resources Management
Office of Environmental Policy and Compliance {Lead}

Subject: Review of Draft Collaboration Handbook
(ER 06/931) (Agency due date: **October 27, 2006**)

The Council on Environmental Quality (CEQ) has transmitted to the Department the latest draft work product developed on Collaboration Handbook to implement the recommendations of the CEQ NEPA task force. Additional background information is available at www.NEPA.gov by clicking on "CEQ NEPA Task Force" in the "Current Developments" section

Would you please have your appropriate field-level office review the handbook from its particular jurisdiction or special expertise and provide comment (including a "no comment") to this Office no later than October 20, 2006. Ms. Elena Gonzalez, Director, DOI's Office of Collaborative Action and Dispute Resolution is the Co-Lead on the CEQ task force and is very much interested in receiving input on the handbook. Bureaus' staff may contact Ms. Gonzalez either by phone (202-327-5352) or by e-mail at Elena_Gonzalez@ios.doi.gov and provide their input directly based on their work experience involving collaboration.

This Office will prepare the Department's comments for signature by the Director, OEPC, by **October 24, 2006**. Please supply all signed paper comments, comments on disk or by electronic mail to this Office.

/S/09/22/06
Vijai N. Rai

cc: Assistant Secretaries
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*Hard copy distributed by regular mail.

Collaboration in NEPA

A Handbook for NEPA Practitioners

Revised DRAFT – September 21, 2006

[CEQ Seal]

This handbook presents the results of research and consultations by the Council on Environmental Quality (CEQ) concerning the consideration of collaboration in analyses prepared under the National Environmental Policy Act (NEPA). It introduces the NEPA practitioner and other interested parties to the complex issue of collaboration, outlines general principles, presents useful steps, and provides information on methods of collaboration. The handbook does not establish new requirements for collaboration or public involvement. It is not and should not be viewed as formal CEQ guidance on this matter, nor are the recommendations in the handbook intended to be legally binding.

Letter from Chairman Connaughton

ACKNOWLEDGMENTS AND CREDITS

This handbook was developed through the collaborative effort of the Council on Environmental Quality's Interagency Work Group on Collaboration.

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I. INTRODUCTION

The National Environmental Policy Act (NEPA)¹ explicitly provides for public notice and comment and encourages public input and involvement throughout the process of reviewing potential impacts of proposed federal actions. This once innovative feature of the 1970 landmark legislation has become routine practice now for most NEPA review processes. However, the full potential for more actively engaging other agencies, affected and interested parties, and the public at large in collaborative environmental analysis and recommendation is rarely realized.

The purpose of this handbook is to assist those within federal agencies who are responsible for conducting environmental reviews in expanding the effective use of collaboration as part of the National Environmental Policy Act (NEPA) process, as called for by the NEPA Task Force Report to the Council on Environmental Quality (CEQ), *Modernizing NEPA Implementation*.² Among its many conclusions, the NEPA Task Force found that collaborative approaches to engaging the public and assessing the impacts of federal actions under NEPA can improve the quality of decision-making and increase public trust and confidence in agency decisions.³

This handbook was designed to give readers both an appreciation of the contribution collaboration can make to improving federal environmental decision making, as well as an understanding of how and when collaboration can be carried out in NEPA processes at the field level. The point is made throughout the handbook that collaboration can be hard work that requires public commitment, different kinds of skills and resources, and a new way of approaching environmental review processes. The cases referenced throughout the handbook show that collaborative processes have been used successfully by federal managers in a variety of contexts and the benefits can be well worth the investment.

The NEPA Task Force found collaborative practice to be synonymous with good government. Additionally, these practices are consistent with the national policy objectives set forth in Section 101 of NEPA. In this section, Congress declared it to be “the continuing policy of the Federal Government ...to create conditions under which man and nature can exist in productive harmony.” To carry out this policy, NEPA makes it the responsibility of the federal government “to take measures so that the nation may:

¹ 42 U.S.C. §§ 4321-4347.

² Council on Environmental Quality NEPA Task Force, “The NEPA Task Force Report to the Council on Environmental Quality - Modernizing NEPA Implementation” (Sept. 2003), *available at* <http://www.ceq.eh.doe.gov/ntf>.

³ Council on Environmental Quality NEPA Task Force, “The NEPA Task Force Report to the Council on Environmental Quality - Modernizing NEPA Implementation,” pp. 24-34 (Sept. 2003), *available at* <http://www.ceq.eh.doe.gov/ntf>.

- 1) fulfill the responsibility of each generation as trustee of the environment for succeeding generations;
- 2) assure all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
- 3) attain the widest range of beneficial uses of the environment without degradation...;
- 4) preserve (cultural and natural) resources and maintain....an environment which supports diversity...;
- 5) achieve a balance between population and resource use ...; and
- 6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.”⁴

The principles underlying Section 101, chief among them productive harmony and balance, inclusion and equity, sustainability and stewardship, efficacy and pragmatism, are in large part the very principles upon which environmental conflict resolution and collaborative problem solving are based. For example:

- representing and including diverse interests and affected communities;
- addressing all key issues of concern to public welfare;
- basing choices and recommendations on the best available information;
- considering impacts and consequences;
- weighing social, economic and environmental values; and
- working toward agreements with long term efficacy for future generations

These are all central tenets for those working collaboratively toward agreement among diverse interests.⁵

These tenets are particularly important to put into action when facing issues that can generate conflict, such as a proposed governmental action that might impact air and water quality, the economic health of communities, the survival of species of wildlife, property rights, the scarcity of water resources, and how we recreate on public lands. Proposals like these often trigger considerable concerns for those whose interests or values might be affected by the proposed action. When strongly held opinions clash, there can be conflict. The collaborative processes discussed in this handbook are capable of anticipating and turning this conflict into constructive problem solving within the context of the NEPA process.

⁴ 42 U.S.C. § 4331.

⁵ National Environmental Conflict Resolution Advisory Committee’s Final report to the U.S. Institute for Environmental Conflict Resolution (Apr. 2005), available at <http://www.ecr.gov/necrac/reports.htm>.

II. COLLABORATION AND ITS BENEFITS

Collaboration is a broadly used term that describes the way in which people work together, literally “co-labor.” Collaboration can be used in many ways to describe attitudes, behaviors, or processes. There are many ways in which to collaborate: informally or formally, as partners or in teams, in advisory capacities or as joint decision makers.

Collaboration in the context of public policy development, implementation and enforcement is often located within a broader spectrum of public involvement activities, where collaborative activities engage parties in relatively higher levels of influence on or responsibility for decision making or other shared action. (See Section IV, A). Collaboration can also be addressed as a methodology for public agencies to work together where they share jurisdictions or need to coordinate their management or regulatory responsibilities, with or without direct stakeholder or public involvement.

The use of the term collaboration in the context of natural resources management and environmental regulation is also associated with several different but related approaches to working together, such as cooperative conservation,⁶ collaborative problem solving, consensus building, and conflict prevention, management and resolution.

In the following section, we clarify the focus on collaboration and its benefits used in this handbook and in the context of NEPA implementation.

A. Collaboration: The Focus of the Handbook

One of the hallmarks of the National Environmental Policy Act (NEPA) when it was passed in 1969 by Congress was its requirements for engaging the public in the environmental review process. Subsequently, CEQ’s implementing regulations made clear that agencies are to work with affected and interested parties through specific public involvement requirements.⁷ Agencies can, and often do, go beyond the requirements. For example, agencies provide notice of certain actions in the Federal Register, hold one or more meetings during scoping, release draft and final NEPA documents for public review and comment, hold public hearings, and provide some form of response to comments.

Several guidance documents have been written on effective public involvement in NEPA (See Appendix C: Resources). Over the past three and a half decades, there has been

⁶ Exec. Order No. 13,352, “Facilitation of Cooperative Conservation,” 69 Fed. Reg. 52,989 (Aug. 26, 2004), 3 C.F.R. 210 (2005), *available at* <http://cooperativeconservation.gov>.

⁷ 40 C.F.R. §§ 1501.4(e), 2506.6, part 1503.

considerable development in public involvement and citizen engagement techniques, processes and best practices. They go well beyond the minimum requirements set forth in NEPA and its regulations and can significantly enhance the satisfaction with NEPA processes and the quality of the outcomes.

For NEPA practitioners and agency decision makers who want to engage more directly in joint action with other agencies and stakeholders, there are fewer resource materials and documentation available, particularly with direct application of collaboration in the NEPA context. Collaboration applies in many contexts and can include a broad range of activities, from information sharing to joint decision making; however there is no set definition. This handbook is an attempt to address collaboration for the NEPA process, as called for by the recommendations in the CEQ NEPA Task Force Report.⁸

This handbook focuses on collaboration directly in the context of NEPA and more specifically as that form of collaboration that is engaging other governmental entities and/or a balanced set of affected and interested parties in seeking agreements at one or more stages of the NEPA process by cultivating shared vision, trust, and communication.

This handbook focuses on collaboration directly in the context of NEPA and more specifically as that form of collaboration that is engaging other governmental entities and/or a balanced set of affected and interested parties in seeking agreements at one or more stages of the NEPA process by cultivating shared vision, trust, and communication. The intention is to encourage such collaboration where appropriate by demonstrating how it has been used and how it can be used to foster more joint efforts at various points or throughout a NEPA process.

The extent of such collaboration can vary depending on who is engaged. It can occur between two or more federal agencies; among federal and state agencies or tribal governments; or with multiple parties representing a broad range of affected interests. The working relationship with a designated Cooperating Agency can constitute a collaborative joint effort with mutual commitments to seek agreement during key stages of the NEPA process. In planning for collaboration, however, it is important to remember that collaboration with Cooperating Agencies or a stakeholder group does not change the agency responsibility to obtain and consider views of the broader public.

Opportunities to use collaboration, focused on in this handbook as joint efforts to seek agreement among multiple interests, arise at many stages of the NEPA process, and can be used for Environmental Impact Statements (EISs) as well as for Environmental Assessments

⁸ Council on Environmental Quality NEPA Task Force, "The NEPA Task Force Report to the Council on Environmental Quality - Modernizing NEPA Implementation," pp. 24-34 (Sept. 2003), *available at* <http://www.ceq.eh.doe.gov/ntf>.

(EAs). Collaboration can occur in the development of a proposed action; during the identification of impacts and issues; in the generation of alternatives; the alternatives analysis process; or in the determination of a preferred alternative. Agencies can use collaboration in one or more discrete stages, or in every aspect of the NEPA process.

Lead agencies can collaborate while maintaining their responsibility for decision-making throughout the NEPA process, including the formulation and issuance of a Record of Decision (ROD) in the Environmental Impact Statement (EIS) process, or a Finding of No Significant Impact (FONSI) in the Environmental Assessment (EA) process.⁹ Collaborative approaches often take an initial investment of time, energy, and resources but can produce savings and benefits in the long term, including mutual education; broader and deeper support for decisions; more enduring agreements; easier and fuller compliance; improved likelihood of ensuring project funding and project implementation; and reduced possibility or costs of extended litigation.

B. The Benefits of Collaboration

Effective collaboration can engage a broader and more diverse range of opinions than the traditional model of formal agency decision-making. The creativity of thought and increased number of ideas unleashed by collaborative processes are well suited for complex environmental issues. What are the possible benefits of collaboration?

Information. Engaging relevant expertise on an issue should result in more informed decision-making. Diverse stakeholders bring additional information, including local knowledge of a resource, to the process of decision-making.

Fairness. The focus on seeking out most or all interests and providing additional means for active participation increases the likelihood that traditionally disadvantaged or under-represented communities or interests will be involved in the process.

Integration. Since collaboration emphasizes a sharing of ideas, opinions, and sometimes resources, it can also enhance integration and coordination among jurisdictions. For example, NEPA's interdisciplinary framework has the potential to allow agencies to

⁹ The lead agency(s) is the agency that proposes the action and is responsible and accountable for the NEPA process. (40 C.F.R. § 1501.5). In cases requiring an EIS, the ROD is a written public record explaining the basis for the lead agency's decision that includes identifying the alternatives considered, specifying the environmentally preferable alternative(s), discussing preferences among alternatives, identifying the factors balanced in making the decision, and stating whether all practicable means to avoid or minimize environmental harm have been adopted. (40 C.F.R. § 1505.2). In cases where an EA was prepared, the FONSI is a document that explains why the proposed action will not have a significant effect on the human environment. (40 C.F.R. § 1508.13)

integrate, coordinate, and streamline the multiple reviews and analyses associated with different legal and permitting requirements.

Conflict Prevention. Parties working collaboratively on a NEPA analysis can identify relevant information early in the analytical process and resolve differences as they arise, thus preventing the kind of serious and debilitating conflicts that can occur when major differences remain unaddressed or only fully surface after a lead agency issues its decision.

Fact-Finding. When employed effectively, innovative tools such as joint fact finding, collaborative monitoring, adaptive management, and others can bring parties to a common understanding of scientific issues, and information on which to solve complex problems and base decisions. If the parties cannot agree on a decision, they may at least be able to agree on the methodology for producing technical information, its strengths, limitations, and uncertainties.

Social Capital. Some of the benefits of collaboration are more long term in nature and perhaps less immediately tangible because they simply cannot be achieved through a single process. Long-term benefits can include improved trust within and between agencies, the formation of partnerships at the community level, as well as a common understanding of the various governmental roles in the NEPA process. The likelihood of future conflict with the same parties can be reduced. In sum, these add up to social capital, civic will, ability, culture, and structures through which diverse stakeholders can engage over time.

Implementation. Collaboration also can enhance and ease the implementation of a decision. If stakeholders have more ownership of the process leading to the decision, they will have a stronger sense of ownership of the decision, and they will tend to accept more ownership in implementing the decision. Moreover, as part of the collaborative process, stakeholders can discuss how best to manage monitoring, enforcement, and future issues.

Reducing Litigation. Enhanced collaboration may reduce or eliminate future litigation by including key stakeholders early and often, solving problems at the lowest possible level as they arise and seeking to build agreement rather than focusing only on decisions. Even if litigation ensues, the issues may be narrowed and parties may be able to reach agreement on less controversial issues.

III. THE CONTEXT FOR COLLABORATION

Before initiating a collaborative effort within a NEPA process, it is critical to understand the context, particularly for efforts to seek agreement among multiple interests. Collaboration may or may not be appropriate or effective in every context or application. In some cases

collaboration is clearly called for; in other cases, a public input or coordination effort may be most appropriate.

A. When Collaboration Works Best

Collaboration works best when interested and affected parties come to understand they can both individually and collectively achieve better outcomes by working together instead of independently. Collaboration may not be appropriate in all circumstances or with all parties. However, there are several situations that can most benefit from collaboration and where collaboration is most likely to succeed.

1. Collaboration in General

While collaboration can, in the words of the NEPA Task Force, be a “deceptively simple concept,”¹⁰ to do it effectively takes hard work, focused attention, adequate time, and considerable dedication of staff and funding resources by all participants. Indeed, private citizens involved in collaborative ventures often serve in a volunteer capacity, donating their time to the enterprise.¹¹ Consequently, the parties to a process must give it high priority to justify the time and resources needed to do a good job. If they lack the time or resources, it is less likely the process will work.

Adaptive management is a process of viewing management actions as experiments rather than solutions. It is a formal and systematic approach to learning from the outcomes of management actions, accommodating change and improving management.

Collaborative approaches often work best when the choices among different alternatives identified and analyzed through the NEPA process are negotiable. Similarly, parties have more incentive to collaborate if the “best” outcome is truly unknown. For example, joint fact-finding may be helpful if the agency has incomplete information and is preparing to obtain additional information to make an informed decision. Collaborative approaches may also apply in a setting where adaptive management is needed. Moreover, the likelihood of litigation, with its costly delays, may strengthen the desire to collaborate.

Support and early engagement from agency leadership, as well as close coordination with the requirements of NEPA, is essential for a collaborative process to have credibility with

¹⁰ Council on Environmental Quality NEPA Task Force, “The NEPA Task Force Report to the Council on Environmental Quality - Modernizing NEPA Implementation,” pp. 25 (Sept. 2003), *available at* <http://www.ceq.eh.doe.gov/ntf>.

¹¹ The Bureau of Land Management recently gave an award to a private citizen for his volunteer efforts serving as Chairman of a group that produced a recommendation on a land use plan (to become part of a proposed action in an EIS) for the BLM Factory Sub Butte area in Utah.

external parties and legitimacy with agency staff.¹² This support includes a commitment to sincerely consider the recommendations that are developed during the process¹³, as well as a willingness to incorporate the recommendations, to the extent possible, into the agency's final decision. Success of a collaborative effort often requires an active, internal agency advocate with sufficient authority or persuasive ability to ensure support and buy-in from agency leadership.¹⁴

Collaboration is often an ideal process for parties that are likely to have a continuing relationship beyond the immediate issue in which they are involved. Federal land managers, for instance, often deal with the same people (community leaders, property owners, advocacy groups) on a variety of issues over a long period of time. The respect and trust established in one project often carries forward to other projects, increasing their chances of success.¹⁵

The prospects for collaboration are enhanced when parties view themselves as somewhat reliant on each other.¹⁶ Collaboration is more likely to succeed when individual parties have come to understand that the value of working toward a joint solution or agreement can exceed the likely outcomes of unilateral action outside the collaboration effort (i.e., through the legislature, the courts, or the media).

2. Collaboration Between Agencies

Agencies that share jurisdiction, authority, or responsibility over an issue have a strong incentive to collaborate. In these cases, unilateral action is likely to be ineffective and perhaps impossible to implement.¹⁷ When agencies work together toward specific agreements, they can maximize their efficiency. NEPA, its implementing regulations, and CEQ guidance, support collaboration between federal agencies and with state, local and

¹² Agency leadership was the driving force behind a twelve agency (including the Department of Transportation and state and local agencies) partnership to develop the I-73 project in North Carolina and South Carolina.

¹³ See discussion of the applicability of the Federal Advisory Committee Act to agreement processes in Appendix E.

¹⁴ Agency leadership was the driving force behind a twelve agency (including the Department of Transportation and state and local agencies) partnership to develop the I-73 project in North Carolina and South Carolina.

¹⁵ This was essentially the basis for the success of the UP Partnership in the Uncompahgre Plateau in Colorado. This multi-stakeholder body consisting of The U.S. Forest Service, the BLM, and state and local agencies formed in the mid 1990s to identify the cause of a decrease in the mule deer population of the Uncompahgre Plateau. The success of that endeavor led to the group taking on many more responsibilities, such as Landscape Assessments, Fuel Reduction Plans, Studies on Grazing allotments, and other projects.

¹⁶ In the Swan Valley Conservation Agreement (1995), the US Forest Service, US Fish and Wildlife Service, and Plum Creek Timber Company agreed on ways to protect threatened grizzlies in the Bob Marshall Wilderness and on land owned by the Plum Creek Timber Company. Each party to the agreement was dependant on the other's performance and good faith for the agreement to be effective.

¹⁷ In the late 1990s the Army Corps of Engineers unilaterally issued an EIS to protect the endangered sparrow in the Everglades. The Corps of Engineers subsequently invited other agencies (NPS, State of Florida, FWS) to cooperate in a supplemental EIS because it found it needed the cooperation of these agencies to effectively accomplish the task.

tribal governments by encouraging lead agencies to designate agencies that share jurisdiction, authority, or subject matter expertise as “Cooperating Agencies.”¹⁸ Cooperating Agency status can be useful for encouraging collaboration, but unless specifically designed for, does not automatically imply a collaborative process.

B. When Collaboration Works Less Well

Parties have little motivation to collaborate if they think they have better ways to achieve their interests. Collaboration in the NEPA process may not work as well if there is strong internal resistance within the lead agency to using the approach. Impediments like scheduling delays, lack of resources, and insufficient staff experience and knowledge might make project managers think twice about designing a collaborative process, particularly if it involves engaging highly polarized and skeptical interested parties.

A common fear is that collaboration means relinquishing control over an agency function or authority. If a lead agency sees no benefit in working directly with others to address the needs and interests of multiple parties, there is little prospect of successful collaboration, even though the agency need not (and legally cannot) delegate their decision-making authority through participating in a collaborative process.

Ambiguity in an agency’s commitment and distrust among parties will also hinder participation in a process. Third party facilitators and process conveners can assuage some of these concerns by assuring all parties that the process will be conducted in a fair and independent manner. However, processes are unlikely to move forward if parties cannot agree on a convener or a third party facilitator or mediator to manage the process.

The role of data can also present a challenge to an effective collaborative NEPA process. Without a shared base of information, a group might have to adopt a joint fact-finding process to establish a credible impartial source of technical expertise.¹⁹

An early assessment of the situation can be a valuable tool in determining whether and how a collaborative approach to one or more phases of a NEPA process will work. Assessments can determine whether affected interests are sufficiently identifiable, organized, and accessible, and whether particular parties are willing to engage in a collaborative effort. A collaborative process may need to be designed differently if parties are difficult to

¹⁸ 40 C.F.R. §§ 1501.6, 1508.5.

¹⁹ For instance, the CalFed Bay-Delta Program is a collaborative effort involving 25 federal, state and local entities that has used Joint Fact-Finding for the purpose of finding ways to improve water supplies in northern California.

communicate with or geographically dispersed. And if key parties are unwilling or reluctant to participate, it will be challenging to engage them constructively in seeking agreements.²⁰

IV. BASIC APPROACH TO DESIGNING A COLLABORATIVE NEPA PROCESS

A. Spectrum of Engagement in NEPA Decision-Making

The use of collaborative approaches may not be appropriate with all entities at every stage of the NEPA process. The level of influence a lead agency might wish to share with other entities during a NEPA process can vary, depending on the goals of the agency. The “Spectrum of Engagement in NEPA Decision-Making” depicted below shows four different levels of potential engagement with other entities, which could include both governmental and/or non-governmental entities.²¹ The Spectrum places collaboration for the NEPA process in the context of these other levels of engagement. From the left side of the spectrum and beginning with the level of least shared influence with parties, they are to: *Inform*, *Consult*, *Involve*, and *Collaborate*.

At the *Inform* level, the agency is informing parties of its activities. At the *Consult* level, the agency is keeping parties informed and considering their concerns and suggestions on the NEPA process. Here the agency is consulting with parties to obtain input on its decision-making process but not coming to an agreement with the outside parties. At the *Involve* level, the agency is working with parties to ensure that suggestions and concerns are addressed and reflected within legal and policy constraints during the NEPA process. At the *Collaborate* level, parties are exchanging information and engaging actively together in working towards agreement on one or more issues at one or more stages in the NEPA process. As previously noted, the focus of this handbook is on the *Collaborate* end of the spectrum; however, all levels may be used in a given NEPA process, and tend to reinforce, in a cumulative manner, the potential for effective collaboration.

The appropriate level of involvement of parties is a situation-specific management decision, recognizing that collaboration might not be appropriate in every case and that an agency might utilize more than one of these levels of engagement in a particular process. Experienced practitioners recognize that the worst thing an agency can do in engaging parties is to create expectations that it cannot fulfill. The mistrust created by promising collaboration and then only delivering information can ruin an agency’s relationships with

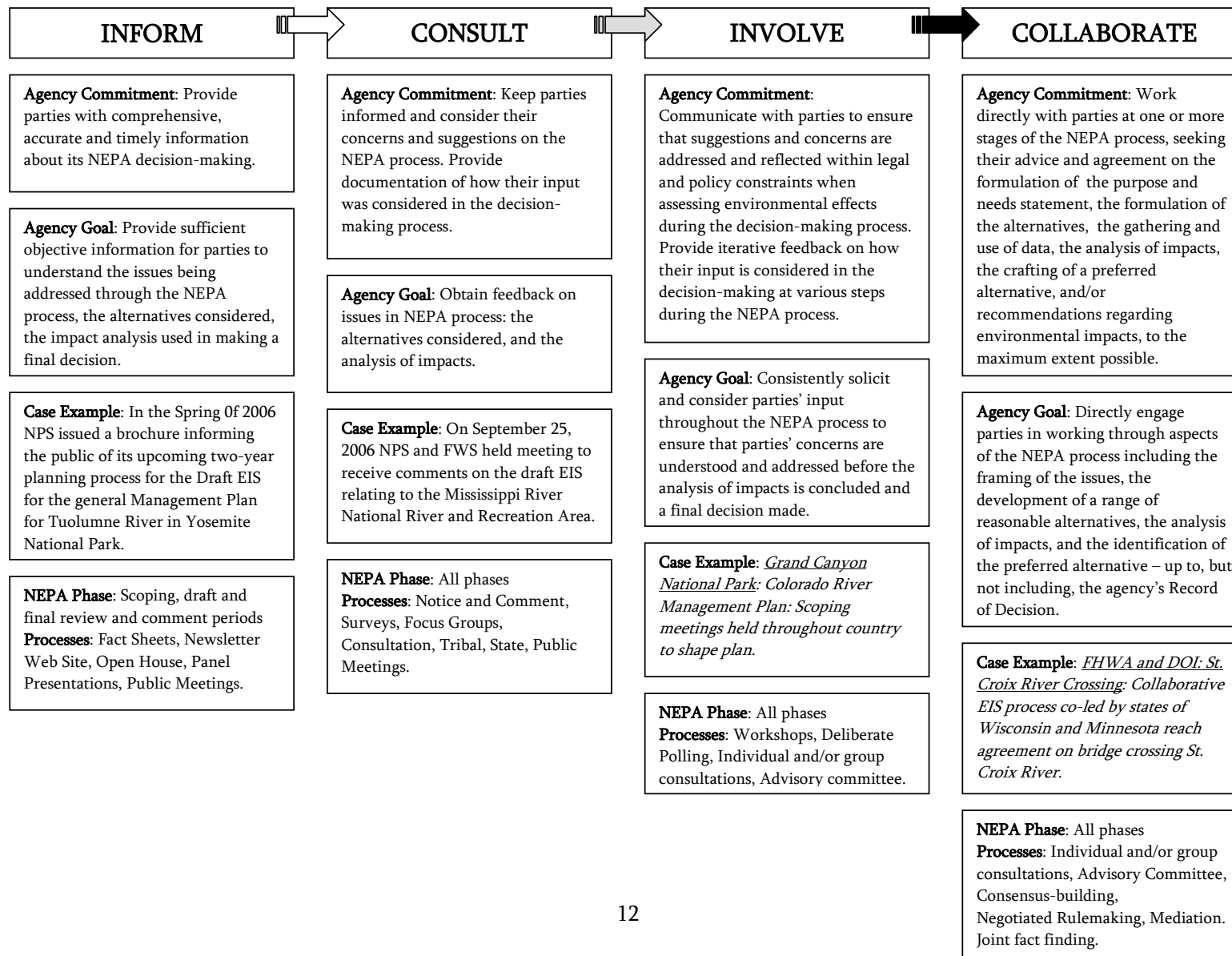
²⁰ For instance, the assessment done for the upcoming negotiated rulemaking for Cape Hatteras National Seashore (to become part of a concurrent EIS) on off-road vehicle use recommended that the rule making committee consist of more members than was originally contemplated (25) in the interests of ensuring a fair process for all concerned interests.

²¹ Adapted from the “IAP2 Public Participation Spectrum” developed by the International Association for Public Participation. For more information about IAP2, please see: <http://www.iap2.org>

parties and undermine public confidence in government. The decision to collaborate will depend on a variety of factors, including:

1. **The entities** with which the lead agency wishes to collaborate.
2. **The extent** to which the lead agency wishes to collaborate with other entities.
3. **When and how in the NEPA process** the lead agency wishes to collaborate with other entities, and
4. In situations **where collaboration is inappropriate or infeasible, whether the lead agency chooses** to use the minimum public involvement requirements of CEQ and agency regulations or employ other engagement processes, such as Inform, Consult, or Involve.

Spectrum of Engagement in NEPA Decision-Making



B. The Phases and Extent of Collaboration

Collaboration within a NEPA process will vary in large part according to the extent to which the proposed action is controversial itself or occurs in the context of previous or ongoing conflicts among parties interested in or affected by the proposal. Accordingly, the processes and principles that are typically drawn on for effective multi-party public policy negotiation, collaborative problem solving, conflict resolution, and consensus-building may be helpful to consult when considering NEPA collaboration. These can be organized generically into five basic phases of activity that can occur in sequence or may well be iterative, depending on the application:

1. assessing and planning;
2. convening and initiating;
3. sharing interests and exchanging information
4. negotiating to seek agreement; and
5. decision making, and implementing (including monitoring and evaluation).

The **assessment and planning phase** encompasses initial efforts to define the problem at issue and assess the opportunity for collaboration. The person or team conducting the initial assessment talks with individuals involved in the issue to identify the full range of interests, who could represent those interests and if and under what conditions they are willing to work together. The assessment determines whether collaboration is appropriate and feasible.²² Assessments map the competing interests to develop an understanding of the dynamics inherent in the relationship between parties.²³ Assessments often result in written reports that are helpful to the parties as they consider how to collaborate most effectively. The assessment process itself can provide opportunities for educating parties about the benefits and appropriateness of collaboration and in some cases enables the first steps toward building trust among the parties and in the prospective collaborative process itself. Collaborative processes that proceed without some form of assessment or feasibility analysis may run into problems because of the failure to identify the unwillingness of stakeholders to participate, lack of interest in the process, hidden or unidentified issues, lack of resources, and other issues.²⁴

²² For instance, a recently completed assessment of a Proposed Negotiated Rulemaking (part of ongoing EIS process) on off-leash dog walking at Golden Gate National Recreation Area found the issue to be ripe for resolution through a collaborative process. An assessment also found a collaborative process feasible to resolve issues surrounding the West Eugene Parkway, in Oregon, that involved the Department of Transportation. In another case involving the Bureau of Land Management, an assessment found that mediation was not a feasible option to resolve a dispute centering on oil and gas issues at Otero Mesa, New Mexico.

²³ Shmueli, Deborah, 2003. "Conflict Assessment" *Beyond Intractability*. Ed. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder, Colorado, USA.

²⁴ McKearnan, Sarah, 1997. Conflict assessment: A Preliminary Step that enhances the chance of success, *Consensus*.

When assessments are completed and reviewed by those interviewed, the lead agency determines if and how they want to move forward and then proceeds with or participates in the completion of the planning effort. Sometimes a collaborative planning team is given the responsibility to complete this phase.

During the **convening and initiation phase**, the lead agency or other convening entity brings representatives of the interested and affected parties together to discuss the issues and the options for collaboration. The goal of this phase is to pave the way for an effective collaborative process. Such convening may be very informal or more structured depending on the complexity of the issues at hand and how ambitious or challenging collaboration might be. Regardless, it is important for the lead agency or other designated convener to clarify expectations, roles and responsibilities about the collaborative process. Typical elements of this phase include establishing ground rules or protocols and identifying any additional key participants that need to be engaged; clarifying areas in need of agreement; determining resource and funding sources; choosing appropriate meeting times and venues; identifying needs for information and technical expertise; selecting an independent facilitator or mediator as appropriate; and sometimes providing training in collaboration for members of the group.²⁵

The **sharing of interests and exchanging information** among the participants in a collaboration is both a critical initial phase of any collaboration and must be provided for consistently throughout the collaborative process as new issues, new information, or unanticipated events arise. This can include carefully managed presentations of concerns by each group without initial comment or criticism to encourage responsive listening and full appreciation of divergent views and experiences. This phase can also include brainstorming activities where issues and concerns are articulated without censure. This is also the phase where essential information and local knowledge is presented or exchanges over information needs and joint fact-finding might occur.

Often considered the heart of the collaborative process, yet in many respects the culmination of an effective collaboration, is the phase where participants **negotiate through deliberative agreement seeking processes**. This phase may be a discrete negotiation over one finite set of issues or may proceed in an iterative fashion over a period of time; for example, throughout an entire EIS process. During this phase, the lead agency and interested parties consider possible options that would best meet parties' needs and interests, and work toward agreements that maximize "joint gains" and minimize costs and losses for all parties.

²⁵ Training in collaborative processes and behavior was given to participants in Golden Gate National Recreation Area Rulemaking, See footnote 9.

As mentioned in the convening phase, the way in which decisions are to be made and agreements determined should be clarified early on. Practitioners of collaborative problem solving tend to encourage group decision-making that is based on consensus rather than majority rule. Consensus decisions can be defined in different ways; as full and unanimous endorsement within the group for example, or as an adequate range of graduated levels of support with no outright vetoes. Some set a lower threshold for agreement on certain types of issues. Some consensus rules require parties to develop alternative solutions that would meet collective needs before opting out. Many groups will set up a default decision-making process if they cannot reach consensus, such as decisions based on super majority or majority votes or provide for minority reports. Third-party neutrals can often help groups devise the decision-making process that is right for them.

The **decision making and implementation phase** is the final phase of collaboration. The primary goal for collaboration at various stages or throughout the NEPA process is to arrive at an optimal feasible solution or recommended alternative that can be implemented. The lead agency, in making its final decision on the proposed action, is well informed by and in a more justifiable position when adopting a consensus-based recommendation. Additionally, the lead agency can draw on the increased capacity for cooperation that has developed through the collaboration to expedite implementation. During the implementation phase, there may be ongoing benefits for the parties to continue working together on some or all parts of the action plan.²⁶

C. Collaborating with Other Agencies and Other Parties

The authorities and procedures for engaging with cooperating agencies differ from those pertinent to non-federal parties. For example, the CEQ regulations²⁷ for implementing the procedural provisions of NEPA distinguish between “cooperating agencies” and “persons or agencies that may be interested or affected.”

A cooperating agency can be “any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment.”²⁸ State and local agencies, as well as Indian tribes, can be designated as cooperating agencies.²⁹ Federal agencies can

²⁶ For instance, the multi agency Glen Canyon Adaptive Management Work Group was formed in 1996 to collaboratively implement an EIS relating to the effect of the Glen Canyon Dam on the downstream environment of the Lower Colorado River.

²⁷ Council on Environmental Quality, « Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, » 40 C.F.R. Pts. 1500-1508 (2005) *available at* http://ceq.eh.doe.gov/nepa/regs/ceq/toc_ceq.htm.

²⁸ 40 C.F.R. § 1501.6.

²⁹ 40 C.F.R. § 1508.5.

collaborate with cooperating agencies as well as with other federal, state or local agencies that do not fall under the cooperating agency criteria.

When a lead agency engages the public or representatives of specific interests as well as individual citizens, there is an array of frameworks that can apply to enable and in some cases constrain those interactions. NEPA itself is the primary framework and perhaps one of the most flexible and encouraging with respect to public involvement and collaboration. Other relevant procedural laws and regulations that can influence the design of collaborative approaches include the Administrative Procedures Act, the Federal Advisory Committee Act, and the Administrative Dispute Resolution Act and Negotiated Rulemaking Act, among others.

V. OPPORTUNITIES FOR COLLABORATION WITHIN THE NEPA PROCESS

NEPA created a process for effectively taking environmental considerations into account in decision-making, and there are many opportunities for building more robust collaboration into the NEPA process. Section 102 of NEPA and its implementing regulations specify minimum requirements for the development of an EIS. The CEQ implementing regulations require agencies to engage in forms of public participation such as notice and comment procedures, and public outreach.³⁰ While these provisions set the minimum level of public participation that must be carried out by an agency, they do not prohibit an agency from going further and employing other methods of public involvement to enhance an agency's level of engagement with interested and affected parties.

While NEPA and its implementing regulations do not apply the same requirements to the development of an EA as to an EIS, agencies may in their discretion choose to apply these processes to the development of an EA. Collaboration may be appropriate for both types of NEPA analyses. This is important, as CEQ estimates that agencies issue far more EAs than EISs.³¹

This chapter provides advice and examples of how to collaborate more fully within and across the different phases of the NEPA process. The summary guide is provided in matrix form at the end of this discussion as an abbreviated tool for NEPA practitioners to use when exploring appropriate approaches to collaboration at different stages in the NEPA process and can be applied to the EA and EIS processes.

³⁰ 40 C.F.R. §§ 1501.4(e), 1503.1(a)(3), and 1506.6.

³¹ Council on Environmental Quality, "The National Environmental Policy Act, a Study of its Effectiveness after Twenty-five Years" (Jan. 1997), *available at* <http://ceq.eh.doe.gov/nepa/nepa25fn.pdf>, estimated there are approximately 1,000 EAs issued for every EIS.

A. The Proposed Action / Development of Proposal

The NEPA process technically begins with the lead agency's proposal of an action, although some agencies may start the analysis process before a need for action crystallizes into a clear cut proposal. The National Park Service, for instance, encourages managers to use the NEPA process as a means to first get the best possible information relating to a particular problem, and then to use this information to develop a concrete proposal for how to address the problem.³² This preliminary step in the NEPA process presents opportunities for the lead agency to work with other public agencies, directly affected stakeholders or interested parties as well as the public to help inform and shape the proposal from the outset. For example, federal land management agencies often use planning procedures developed initially by the USDA Forest Service³³ to collaboratively develop the desired future conditions of areas of federal land. In many planning processes these desired future conditions are rolled into subsequent proposed actions that initiate the NEPA process. This is an opportune time for engaging the public in this early phase of the NEPA process through a variety of means (see the Spectrum on page 12 and Guide on page 24). This early collaborative involvement can be effective in minimizing the contentiousness of issues that can surface during scoping. The earlier the lead agency collaborates with other agencies and the public, the easier it can be to conduct the NEPA process and implement final decisions.

If the proposal is likely to generate new conflicts among contending interests that do not appear to be easily reconcilable, or if prior conflicts are likely to be renewed among parties with a history of disagreements, the lead agency may want to conduct or commission a situation assessment and engage a representative group of parties to contribute to the formulation of a proposed action statement.

B. The Role of Cooperating Agencies

At the outset of any NEPA process, the lead agency needs to consider the degree to which it wishes to seek agreement at the various stages of the NEPA process with cooperating agencies. Other federal, state, local, and tribal agencies that have jurisdiction by law or special expertise about the proposal or any alternatives can be cooperating agencies.³⁴ It is helpful to remember that working with cooperating agencies is not subject to the Federal Advisory Committee Act (FACA) so long as the group of cooperating agencies is composed

³² See National Park Service D.O. 12.

³³ See "Plan Implementation/Public Involvement" Triangle, U.S. Forest Service, *available at* <http://www.fs.fed.us/biology/planning/guide/howorganized.html>. These procedures were used by a multi stakeholder group in the Sonoita Valley, Arizona, to develop the desired conditions for the Las Cienegas National Conservation Area. The conditions were later incorporated into the preferred alternative for the plan for this area.

³⁴ 40 C.F.R. §§ 1501.6 and 1508.5.

exclusively of federal officials and elected officials from Federal, State, and local governments or tribes (or their designated employees with authority to speak on their behalf).

The lead agency should also consider how it wishes to work with public agencies that are not deemed cooperating agencies. It is possible to develop alternative arrangements to structure consistent communications, coordination, and information sharing with other interested federal and state agencies and tribes.

The extent of the willingness of other agencies to participate formally or informally in a lead agency's NEPA process depends in part on the potential for effective collaboration and the role anticipated for other agencies in the process. A situation or conflict assessment could be helpful in clarifying expectations for partner agencies in the process.

C. Notice of Intent

The publication of a Notice of Intent in the Federal Register is the first formal step in an EIS process. The lead agency could use the Notice of Intent to emphasize its commitment to collaboration and to outline a shared process that it intends to use to engage interested parties throughout the analysis. In undertaking an EA, the lead agency can use other forms of notice to the public to announce its process and intention to collaborate.³⁵

D. Establishing Purpose and Need

When establishing the purpose and need for a proposed action the lead agency should identify the other agencies that have jurisdiction by law or special expertise over the issue.³⁶ This is a good time to also determine whether there are outside interests that should be engaged early on to inform the development of the purpose and need statement, and whether it is desirable and possible to convene representatives from a balanced array of those interests.

This kind of analysis works best when the lead agency has an idea of what it wants to do but has not firmly established a proposal. Seeking agreements with another agency and/or interested parties at this level can help frame the purpose and need for action so that it clearly describes their common understanding, as well as any regulatory and fiscal constraints that must be satisfactorily addressed in developing a viable solution. Developing a proposal collaboratively at this stage increases the likelihood that affected and interested

³⁵ Such as Federal Register Notices, Announcements on Web Sites, Newspapers, Newsletters, and other forms of media.

³⁶ In drafting the EIS for the Spring Mountains National Recreation Area of Toiyabe National Forest in Nevada in 1994, the Forest Service (lead agency) entered into an Inter Agency Agreement with the U.S Fish and Wildlife Service to work together on a Plan amendment that would meet the needs of all species in the Recreation Area.

parties will better understand and agree with the purpose and need and be willing to contribute to the formulation or review of the proposal and subsequent alternatives.

Collaboration might not be appropriate or feasible with all entities at this point, or the lead agency may choose not to engage others at this phase. This would be an appropriate juncture to review the benefits of collaboration noted in Section II and the discussions on when collaboration works best or less well in Section III A and B. Situation or conflict assessments may also be useful in this phase to discern the level of agreement or disagreement between interested parties and the feasibility for engaging in a collaborative process at this time.

E. Scoping

Scoping is an early and open process for determining the scope of issues to be addressed in an EIS and for identifying the significant issues of concern related to a proposed action. By collaborating with others at this point, the lead agency can help to ensure that the analysis adequately addresses those issues of import to affected stakeholders and interested parties.³⁷ A situation assessment here (if not conducted in an earlier phase) will help determine who should be involved in the scoping process, to what extent, and for what purpose. Collaboration during scoping can help define the study boundaries, identify possible effects of various actions, and establish a schedule for the analysis. Specific mechanisms to share information, such as a project websites and periodic newsletters, can be set up. The lead agency can use this process to clarify the roles of participants, determine gaps in resources, establish dispute resolution procedures, reach agreement with parties on meeting protocols and ground rules, and clarify project goals and objectives. The lead agency can conduct an assessment through individual interviews to identify the key issues and concerns expressed by stakeholders. Practices, such as individual interviews to detail issues and concerns, workshops that generate dialogue on issues in detail and prioritize them, along with continued meetings among cooperating agencies to further identify and prioritize issues, can be useful techniques during scoping.

If the lead agency decides to establish a representative group to work toward agreement consensus on scoping, it may also need to consider an appropriate legal procedural framework for this, including applicability of the Federal Advisory Committee Act (see Section VI. D. and Appendix E).

³⁷ From 2002-2004 Grand Canyon National Park conducted extensive scoping meetings throughout the United States, using innovative techniques (small meetings, stenographers, Poster Boards, writing on maps) to frame the issues for the Colorado River Management Plan EIS.

F. Alternatives Development / Preferred Alternative

Developing and assessing alternatives and then working toward a preferred alternative can be a central function for a collaborative process. It is important that proposals containing unresolved conflicts over alternative uses of natural resources contain alternatives to the preferred alternative.³⁸ The development of alternatives is a complicated “choice-making” enterprise that is conceptually challenging and laden with value judgment and assumptions, either unspoken or even unrecognized. The selection of alternatives for analysis drives the remainder of the NEPA process, framing the issues, the possible solutions, and the analysis. Thus, if agencies are to obtain broader agreement in the final, preferred alternative, increasing and engaging in effective collaboration at this stage of NEPA is absolutely essential.

The conceptual and management challenges to developing the “right” set of alternatives is difficult within an agency, and becomes even more challenging when cooperating agencies and other stakeholders are brought into the process. It requires intensive education, explanation, deliberation, and consideration of myriad ways in which objectives (purpose and need) can be met and alternatives can be structured. The more collaborative and effective the process is at this stage, the more likely that alternatives will emerge from within the agency’s process, rather than from without, and the more likely that in the deliberation over the Draft EIS, stakeholders can focus on the choices among alternatives. Agencies can use a range of techniques to enhance collaboration during alternatives development and finalization. For example, they might:

- Sponsor public workshops to discuss draft alternatives, seek out recrafting and improvements of them, and identify any new ones that are viable.
- Work with cooperating agencies to identify, and refine alternatives.
- Work with Advisory Committees or other existing stakeholder groups to identify, and refine alternatives.
- Work with groups organized by others (Chambers of Commerce, environmental coalitions) to identify, and refine alternatives.

G. Affected Environment and Environmental Consequences (Analyzing Impacts)

The analysis of alternatives can also be challenging. As the preferred alternative is discussed, one or more parties may challenge the technical analysis of the alternatives. They may

³⁸ 42 U.S.C. § 4332 (2)(E).

question who did the analysis, what assumptions were made, the data that was generated and used, and the conclusions that are drawn. Collaboration not only improves the credibility of this analysis on its technical merits, but also its legitimacy in the eyes of diverse stakeholders. The use of expert panels as part of a joint fact-finding process to gain broad credibility and confidence in the findings from the impacts assessment is another way to enhance collaboration without jeopardizing the lead agency's ultimate authority to decide whether to proceed with the proposed action.³⁹

An agency might:

- Hold a public “state of the science” workshop(s) to have experts discuss available information – what is known, not known, what can be studied easily or not, what assumptions rest within certain analysis, and what uncertainties exist.
- Convene experts from cooperating agencies, including tribes and local municipalities, to jointly undertake the analysis, thus bringing in additional expertise as well as increasing opportunities for agreement on the results.
- Collaborate with other agencies or parties to determine the appropriate methodologies for scientific analysis (e.g., assessing existing conditions). For example, when performing a cumulative impact analysis, the determination of the geographic and temporal boundaries to be used in the analysis could be determined and agreed upon by the agencies with jurisdiction, interested stakeholders and the lead agency.
- Engage in some kind of “peer review” or expert panels on key studies or findings that includes public workshops where scientific deliberation can take place transparently, stakeholders can pose questions and make comments.⁴⁰

H. Addressing Mitigation

Similar to the affected environment and environmental consequences phase, the lead agency could use collaborative approaches to collaborate with other agencies or parties to determine the appropriate methodologies and criteria to use for assessing mitigation strategies.⁴¹

I. Managing Draft and Final Reviews

At these stages, collaboration is more focused and likely more formalized, especially if effective collaboration has been used in all stages leading up to the formal public comment

³⁹ See footnote 19 (CALFED Bay Delta).

⁴⁰ See footnote 19 (CALFED Bay Delta).

⁴¹ In 1990, a mediation of appeals to a Forest Plan essentially resulted in a new EIS for Sequoia National Forest. Agreements reached included how to mitigate impact of grazing and timber harvesting.

and review periods. The public review and comment periods and their concurrent public engagement for the Draft or Final EIS or EA might involve:

- A series of workshops getting more detailed and nuanced feedback than standard public meetings.
- Poster board sessions or other types of meetings with individual groups such as Chambers of Commerce to explain the draft, the preferred alternative, and to obtain feedback
- Multiple means to provide comment from formal public hearings to letters, web submittals, and so forth.
- Receiving final, formal feedback from organized groups such as the cooperating agencies, resource advisory councils or committees (RACs), or other kinds of advisory groups.

These periods also provide an opportunity to establish and build internal and interagency leadership commitment. Once comments are received, the lead/proposing agency could collaboratively consider comments received on a Draft or Final EIS or EA with other cooperating agencies and collaborating entities before issuing the final ROD or FONSI.

J. Record of Decision (ROD) / Finding of No Significant Impact (FONSI)

Legal authority for issuing the ROD or FONSI resides in the lead agency and may not be shared or delegated to others. That said, federal decision-makers can indicate their desire early on to develop their decision-making based on a credible process in which the affected and interested parties have been collaboratively engaged. Such a signal can strengthen the commitment of parties to represent their interests effectively and to strive to reach an agreement on how to frame the final decision that adequately meets the purpose and need as well as the interests of all those involved.

K. Implementing and Monitoring Decision

The lead agency may choose to establish a means of cooperating with other relevant agencies or interested parties to collectively monitor implementation of the ROD for an EIS, or selected action if an EA was conducted. Through monitoring, the collaborative group (for example, an adaptive management team) can determine whether project objectives have been achieved, as well as whether adjustments need to be made based on project and

mitigation performance.⁴² Collaboratively monitoring the commitments made in the decision and the anticipated impacts and outcomes can be considerably more effective and efficient than relying solely on the lead agency to perform this task.

L. Guide to Collaborative Engagement during NEPA Stages

The following guide depicts some of the factors agencies can take into account at each stage of the NEPA process when considering how to collaborate with other agencies, entities, or individuals.

⁴² As noted above, the Glen Canyon Adaptive Management Working Group was formed to implement the EIS issued for the Glen Canyon Dam in 1996.

GUIDE TO COLLABORATION DURING NEPA STAGES

A tool to help NEPA practitioners identify opportunities and options for collaboration at various NEPA stages.

NEPA Stage	Collaboration Goal	Commitment	Options/Tools	Issues	Case Examples
Developing the Proposed Action	Inform and shape optimal proposed action from outset.	Directly engage or partner with appropriate agencies, stakeholders or interested parties in the proposal development process.	Community or regional information exchange meetings/workshops. Meetings with stakeholders and interest groups. Situation assessment. Initiate multi-stakeholder forums or committees.	With whom is it appropriate or feasible to collaborate with at this phase? Applicability of FACA and/or the Negotiated Rulemaking Act (NRA)	<i>Collaborative Environmental and Transportation Agreement for Streamlining (CETAS)</i> Transportation and resource agencies in Oregon discuss issues early in the NEPA process through regular working group meetings, fostering relationships built on trust.
Cooperating with Other Agencies	Determine extent of interagency collaboration and clarify roles and responsibilities.	Work in partnership with agencies through a clearly articulated structure and process for collaborative decision-making.	Granting cooperating agency status to agencies and tribes. Other arrangements for interagency cooperation and coordination. Interagency meetings/forums/committees. Situation assessment.	What is the agency level of interest in the proposal? Are agencies willing to be cooperating agencies or enter into agreements to collaborate? What is the need and feasibility for resource sharing among agencies?	<i>Everglades</i> . Starting in late 1990's, US Army Corps of Engineers develops Supplemental EIS to protect endangered Sparrow with Cooperators after initial effort that lacked Cooperators was not successful..
Issuing Notice of Intent (NOI)	Delineate and publicize agency commitment to collaboration.	Clarify goals and initial plans for collaborating with other agencies, stakeholders and parties.	Outline in NOI to the extent feasible how lead agency intends to proceed. Supplement NOI with public meetings /discussion forums.	Watch out for expectations that cannot be met. Applicability of FACA and/or NRA?	<i>Las Cienegas National Recreation Area</i> : EIS issued in 2003 refers to multi-stakeholder collaborative effort that led to agreements on use and protection of Las Cienegas National Recreation Area.

NEPA Stage	Collaboration Goal	Commitment	Options/Tools	Issues	Case Examples
Establishing Purpose and Need	Adjust and strengthen justification for proposed action by addressing needs and concerns of affected stakeholders, interested parties, and public.	Frame the purpose and need statement based on shared understanding of issues, as well as any regulatory and fiscal constraints that must be satisfactorily addressed in developing a viable solution. Acknowledge that the purpose and need of the proposal provides the basis for collaboration in the NEPA process.	<p>Identify other agencies with jurisdiction by law or special expertise and consider appropriate collaboration framework.</p> <p>Situation assessment.</p> <p>Identify interests that would be affected by proposal and should be engaged early on.</p> <p>Convene balanced array of interests to collaborate on development of the purpose and need statement.</p>	<p>Identify potential value and risks of initiating or not initiating collaboration at this point.</p> <p>Think through clearly to avoid unattainable expectations.</p> <p>Applicability of FACA and/or NRA</p>	<i>Spring Mountain National Recreation Area</i> : In 1994, Forest Service (lead) and Fish and Wildlife Service (Cooperator) enter into interagency agreement which enables them to jointly develop EIS, including Purpose and Need and subsequent steps of process.
Scoping	Assure comprehensive scoping of issues to inform appropriate analysis of alternatives.	Work collaboratively with other agencies and/or parties to identify nature and extent of issues and impacts to be addressed in the EIS.	<p>Individual interviews or situation assessment to detail issues and concerns.</p> <p>Workshops/field trips/study forums to generate dialogue and set priorities.</p> <p>Visioning or collaborative planning processes.</p> <p>Joint fact-finding or mapping exercises.</p> <p>Representative stakeholder group.</p>	<p>Applicability of FACA and/or NRA</p> <p>Are all interests represented?</p> <p>Is issue ripe/ready for collaboration?</p> <p>Time constraints.</p> <p>Resources required.</p> <p>Is all relevant information available, accessible, being used?</p>	<i>Spring Mountain National Recreation Area</i> : In 1994, Forest Service (lead) and Fish and Wildlife Service (Cooperator) enter into interagency agreement which enables them to jointly develop EIS, including Scoping and subsequent steps of process.

NEPA Stage	Collaboration Goal	Commitment	Options/Tools	Issues	Case Examples
Developing Alternatives	Jointly develop alternatives that address the array of conditions, issues and concerns raised, presenting viable options and choices for consideration.	Work collaboratively on alternatives development with other agencies/ parties involved in collaboration.	<p>Joint fact-finding.</p> <p>Representative stakeholder group.</p> <p>Topical study groups, working subcommittees, or public advisory/review groups.</p> <p>Public/private partnerships for sharing resources and expertise.</p>	<p>Applicability of FACA and/or NRA</p> <p>Does range of alternatives reflect full spectrum of views?</p> <p>Are all interests represented and concerns taken into account?</p>	<p><i>Wisconsin: Karner Blue Butterfly:</i> In mid 1990's multi-stakeholder group develops combined Habitat Conservation Plan/EIS. Group discusses all alternatives. Group's preferred alternative becomes basis for ROD.</p>
Analyzing Impacts and Addressing Mitigation	Strengthen rigor and credibility of impact assessment and mitigation strategies.	Collaborate with other agencies or parties to determine the appropriate methodologies and criteria to use for scientific analyses (assessing existing conditions) and mitigation strategies.	<p>Joint fact finding.</p> <p>Expert panels as part of joint fact finding.</p> <p>Multi-party review group.</p>	<p>Extent of certainty or consensus about technical/scientific data and methodologies.</p> <p>Connection between technical issues and policy choices.</p> <p>How analyses and findings can be communicated to lay people.</p> <p>Applicability of FACA and/or NRA</p>	<p><i>San Juan National Forest, Southern Colorado - USDA Forest Service</i></p> <p>Working groups focused on particular scientific or technical issues; outside experts were brought in to explain the state of scientific knowledge, then facilitated small groups would discuss how it applied to the plan revision.</p>

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NEPA Stage	Collaboration Goal	Commitment	Options/Tools	Issues	Case Examples
Managing Draft and Final Reviews	Assure adequate time and breadth of outreach for solicitation and collection of public comments and for analysis and consideration before ROD or FONSI. Build internal and interagency leadership commitment.	Shared process for review of and response to public comments with other agencies and parties in collaboration, ensuring comments from parties are understood and addressed in Final EIS/ROD or EA/FONSI.	Inter-agency working group to review comments. In-depth public comment workshops. Meetings with issue groups.	Applicability of FACA and/or NRA	<i>Wisconsin: Karner blue Butterfly:</i> Multi Stakeholder group (Fish and Wildlife Service lead) collaboratively considers comments on draft EIS to jointly produce final EIS. <i>Everglades:</i> In late 1990's Interagency group refines preferred alternative based on comments to EIS for purpose of protecting endangered sparrow.
Implementing and Monitoring Decision	Share implementation and monitoring expertise, resources and accountability.	Work collaboratively with other agencies and parties in monitoring implementation of ROD.	Interagency or multi-party monitoring or adaptive management group.	Applicability of FACA and/or NRA	<i>Glen Canyon National Recreation Area:</i> EIS issued in 1995 on operation of Glen Canyon dam indicated that there was much uncertainty regarding the downstream impact of water releases from Glen Canyon Dam. The Glen Canyon Dam Adaptive Management Group has been set up to perform this function.

VI. ADDRESSING CHALLENGES TO NEPA COLLABORATION

Introducing more effective collaboration into NEPA is not without its challenges. This chapter addresses four sets of commonly acknowledged or perceived challenges, including resource requirements, conflict dynamics, internal federal culture, and the Federal Advisory Committee Act. Most important for addressing any of these, as mentioned previously, is determining the value and appropriateness of engaging in a collaborative NEPA process to the lead agency. If there is recognized merit in collaborating in some explicit manner on a given NEPA process, then the challenges described below can generally be addressed.

A. Resource Requirements

Challenges: Collaboration is very rarely an inexpensive, easy, and quick fix to a problem. This usually has more to do with the magnitude of the problem than the efficacy of collaborative problem-solving. The high stakes of complex environmental conflict - whether it involves property rights, the economic health of local communities, the health of natural resources, or something else - often trigger strongly held views that make environmental issues rarely amenable to quick and easy fixes. Groups need time to work out a process, to develop a shared vision, and to develop trust and respect between members. If the meaning, availability or certainty of data is at issue, the process might need a deliberative phase for information gathering and exchange (e.g., a joint fact finding process). Such a phase would help the group better assess and come to mutual understanding on the relevance and significance of the data. If the proposed action affects a variety of interests, the group might have to be expanded to incorporate these interests while developing and assessing alternatives. All of these considerations can lengthen a process, as well as require funding and the time and skill of agency personnel.

Opportunities: The additional time and expense that a collaborative process might add to a stage of the NEPA process, however, can be well worth an agency's while if it results in a more robust, tailored, creative, and enduring agreement, an implementable preferred action, increased trust and social capital, and relationships that work constructively on this and future projects. In weighing these factors, agencies throughout the federal government have places to turn to for help in identifying the costs and benefits of collaborative problem-solving. The U.S. Institute for Environmental Conflict Resolution⁴³ (U.S. Institute) was established for the purpose of assisting agencies in assessing collaboration opportunities and resolving the types of environmental conflict often involved in NEPA processes. Many agencies have established similar programs to help their personnel involved in environmental conflict such as EPA's Conflict

⁴³ See <http://www.ecr.gov>.

Prevention and Resolution Center and DOI's Office of Collaborative Action and Dispute Resolution. Agencies like the U.S. Institute and its agency-specific counterparts can provide expert guidance in conflict resolution to NEPA decision-makers that demystifies the collaborative process.

B. Managing Conflict while Practicing Collaboration

Challenges: Because passions often run deep in environmental conflict, discussion between parties can become acrimonious. Parties might question the good faith of other parties, as well as the federal agency convening the process. Conflict is often embedded in historical relationships (good and bad), and framed by advocates and vocal groups, often at the expense of interested parties who have not made their voices known. Conflicts may be driven by poor communication, conflicting interests, competing values, changing demographics, and poor relationships. One of the challenges in carrying out a successful collaborative process is to recognize and address these dynamics, so that competing interests can be discussed in a constructive manner.

Opportunities: One way to address these complex dynamics is to follow the best practices of collaborative problem-solving. The *transparency* of a process should give skeptical parties the assurance that there is nothing happening behind the scenes and therefore beyond their control. A *focus on interests instead of positions* can get parties to talk more openly with one another about what they hope to achieve through the process. An emphasis on *inclusivity and balance of interests* can give comfort to parties who might be concerned that the process will favor one interest over another. A group that has *autonomy* will have the confidence that it is not under the control of a particular agency or party. A group whose members are *committed to working through the issues* and with one another toward a common goal will have confidence that they are engaged in a worthwhile endeavor. In addition, the use of a third party neutral can give all parties the assurance that the process will be fair and impartial.

For more detailed strategies for preventing conflicts in the context of collaboration, see Appendix D.

C. Federal Agency Culture

Challenges: The NEPA Task Force found that “the decision to bring people to the NEPA table and not proceed with the analysis until everyone is comfortable with their role, the process, and the projected products seems to contradict agency objectives to expedite

analyses and decisions.”⁴⁴ Furthermore, the Task Force reported “although many (respondents) agreed with the concept of collaboration, only a few claimed a collaborative experience.”⁴⁵ These observations underscore the importance of educating agencies on the value of collaborative processes to increase their familiarity and comfort level with their use.

In advocating for a new way of “doing business,” it is important to acknowledge the underlying tensions between the traditional NEPA practices and what is required for investing in new collaborative approaches. For example, to some agency officials, the use of collaborative processes is perceived as adding unacceptable time delays to the NEPA process. However, as noted above, the time savings an agency might achieve by forgoing a collaborative process are often illusory, if the failure to collaborate results in the proposed action being delayed, or the EA or EIS being redone because it failed to take into account all interests.

Another commonly held belief is that the collaborative process wrests decision-making authority away from the agency. This is not the case. Agencies retain the authority for final decisions in collaborations under NEPA. Additionally, if the agency is represented as a participant in the collaborative effort, it will have the opportunity to influence the group’s decisions, making it unlikely that a collaborative group can “blind-side” that agency’s leadership with an unexpected recommendation.

Opportunities: As collaborative processes become increasingly ingrained in an agency’s culture, more of its personnel will have stories to tell of its use – successes and challenges. The transmittal of first-hand knowledge from one NEPA practitioner to another will help demystify the concept of collaboration and enable managers to make informed decisions about the use of collaborative processes.

Ultimately, the principles of collaboration need to seep into the everyday work environment before they become part of an agency’s culture. As the Task Force noted, “(i)f integrating more agencies into NEPA processes is a goal of the Federal government, time must be spent instilling the values underlying that goal.”⁴⁶ Federal agencies can benefit from dedicating resources to training, to support and to creating an agency culture that supports collaboration.

⁴⁴ Council on Environmental Quality NEPA Task Force, “The NEPA Task Force Report to the Council on Environmental Quality - Modernizing NEPA Implementation,” pp. 27 (Sept. 2003), *available at* <http://www.ceq.eh.doe.gov/ntf>.

⁴⁵ See above.

⁴⁶ Council on Environmental Quality NEPA Task Force, “The NEPA Task Force Report to the Council on Environmental Quality - Modernizing NEPA Implementation,” pp. 25 (Sept. 2003), *available at* <http://www.ceq.eh.doe.gov/ntf>.

To this end, a jointly issued policy memorandum by the Office of Personnel Management and CEQ seeks to strengthen collaboration skills in senior executives of federal agencies.⁴⁷ The implementation of this directive will give agencies an opportunity to ingrain the principles of collaboration into their respective cultures by establishing training programs and performance measures that work toward making collaboration a standard business practice.

D. The Federal Advisory Committee Act (FACA)

FACA governs the establishment, management, and termination of advisory committees within the executive branch of the federal government. FACA applies to groups that include individuals who are not federal employees if the group is established, managed, or controlled by a federal agency to obtain collective advice. FACA does not apply when the group is composed exclusively of federal officials and elected officials from Federal, State, and local governments or tribes (or their designated employees with authority to speak on their behalf) and the purpose of the group is to exchange views, information, or advice relating to issue(s) of intergovernmental responsibility and administration, as can be the case when working collaboratively throughout the NEPA process. FACA requires, among other things, that such groups be chartered, their meetings be noticed in advance and open to the public, the membership be balanced in the points of view represented, and the public have an opportunity to submit comments.

Challenges: FACA can present procedural and structural challenges to agencies wishing to collaborate with groups that include non-federal organizations or private citizens. Among other things, to determine whether a group needs to be chartered under FACA several questions need to be answered, including what is the membership of the group (are non-federal organizations or private citizens involved?), what is the product of the group (is it giving group advice?), and who controls or manages the group (a federal agency?). The answers to these questions, addressed in more detail in Appendix E, are sometimes very fact-specific.

Opportunities: Questions relating to FACA can be more easily answered by clearly determining the purpose of the collaborative effort and then exploring the most appropriate forum or structure to support that effort. Depending on the goals of the parties, collaborative processes can be designed that both meet the interests of all members of a group and satisfy FACA. In some cases, existing FACA committees can become the “parent” committee; in other cases, an independent forum under non-federal leadership may be more appropriate. In many instances, chartering a FACA committee

⁴⁷ OPM/CEQ Memorandum Implementing Executive Order 13352, November 25, 2005.

can be expedited and serve the purposes of collaboration perfectly. Since FACA provides for several of the best practices of collaborative problem-solving, FACA committees are often ideal vessels for carrying out a collaborative process. There are several ways to approach the challenges posed by FACA, particularly if they are viewed as opportunities to design the best possible process for the intended purpose. These concepts are discussed in greater detail in Appendix E.

VII. CONCLUSION

People are interested and care about proposed governmental actions that go through the NEPA evaluation process. Proposals that might impact air and water quality, wildlife, property rights, and the economic well-being of communities, among others, can trigger fervent and conflicting views.

Two of the major purposes of the environmental impact assessment process are better informed decisions and citizen involvement, both of which should lead to implementation of NEPA's policies. The CEQ NEPA Task Force found that federal agencies can perform this function more effectively by working collaboratively with representatives of interested and affected parties. Collaborative processes, though, can be a challenge to implement successfully. It is often difficult to bring together people who are asserting competing interests that often result in environmental conflict.

Federal managers need tools that can deal with possible environmental conflict that can impede or derail a NEPA process; and with which they can turn that conflict into a constructive force. The information provided in this handbook will enable federal managers to learn about some of these tools for working collaboratively with others in NEPA processes for the purpose of accomplishing their missions more effectively.

APPENDIX A: EXAMPLE MEMORANDA OF UNDERSTANDING

Appendix A contains example Memoranda of Understanding from several projects that used a collaborative approach for operating plans, roles and responsibilities for conducting NEPA preparation and review and/or solving problems that arose during the NEPA process. Please note that these samples are not intended to be templates or to demonstrate appropriate MOU language. You should consult your agency attorney regarding appropriate content of and legal issues relating to MOUs.

APPENDIX A1

AMENDED MEMORANDUM OF UNDERSTANDING
between
UNITED STATES ARMY CORPS OF ENGINEERS, JACKSONVILLE DISTRICT;
and
NATIONAL PARK SERVICE, EVERGLADES NATIONAL PARK;
SOUTH FLORIDA WATER MANAGEMENT DISTRICT;
UNITED STATES FISH AND WILDLIFE SERVICE, SOUTH FLORIDA FIELD OFFICE

**AGREEMENT TO JOINTLY SPONSOR COLLABORATIVE
COMBINED STRUCTURAL AND OPERATING PLAN (“CSOP”)
ENVIRONMENTAL IMPACT STATEMENT (“EIS”) PROCESS**

A. PARTIES

This Amended Memorandum of Understanding (AMOU) is hereby entered into by, between, and among the United States Army Corps of Engineers, Jacksonville District (the “Corps”), the National Park Service, Everglades National Park (the “Park”), the South Florida Water Management District (the “District”), and the United States Fish and Wildlife Service, South Florida Field Office (the “Service”).

B. PURPOSES

As established in the National Environmental Policy Act (NEPA), under which this CSOP EIS process is being conducted, it is the continuing policy of the federal government, in cooperation with State and local governments, Tribes, and other concerned public and private organizations, to use all practicable means and measures, including technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Accordingly, the purposes of this AMOU are:

- To establish the parties’ agreement and commitment in jointly sponsoring a collaborative Environmental Impact Statement (“EIS”) process under NEPA in the development of a

Combined Structural and Operating Plan (“CSOP”) for Modified Water Deliveries to Everglades National Park (Mod-Waters) and the Canal 111 Project (“C-111”).

- To establish the Park, the District, and the Service as cooperating agencies in the CSOP process.
- To affirm that the Corps has sole and ultimate decision-making authority for the Record of Decision and primary responsibility for NEPA compliance and preparation of the EIS.
- To establish the commitment of the parties to seek agreement on key stages in the EIS process, including: development of the Purpose and Need Statement for the proposed action, development of the Goals and Objectives for the proposed action, development of a range of alternatives, modeling and analysis of the alternatives, consideration of public comments, and development of a preferred alternative.
- To affirm the commitment of the Corps to fully consider the views of the Park, the District, and the Service in developing its Record of Decision and to work with the agencies to collaboratively monitor the impacts of its decision.
- To affirm the agencies’ agreement to jointly sponsor a multi-stakeholder process in which they will collectively consult with and seek the involvement of other entities that may have an interest in participating in the CSOP EIS process.
- To incorporate the Ground Rules to which reference is made in the original Memorandum of Understanding (C-13447), to make other changes consistent with the Ground Rules, and to make other changes.

C. AUTHORITIES

This AMOU is based on and consistent with the authorities provided in the following laws, regulations, orders, decisions and documents:

- Everglades Preservation and Expansion Act of 1989, Public Law 100-229
- National Environmental Policy Act of 1969, as amended, 42 USC § 4321 et seq.
- The Endangered Species Act of 1973, as amended, 16 USC § 1531 et seq.
- Environmental Policy and Conflict Resolution Act of 1998, Public Law 105-156
- Administrative Dispute Resolution Act of 1996, Public Law 104-320
- Title 33, Code of Federal Regulations, Part 320
- Title 40, Code of Federal Regulations, Parts 1500-1508
- Executive Order 11988, Floodplain Management, May 24, 1977
- Executive Order 11990, Protection of Wetlands, May 24, 1977
- Executive Order 13158, Marine Protected Areas, May 26, 2000
- Executive Order 13112, Invasive Species, February 3, 1999
- Executive Order 13089, Coral Reef Protection, June 11, 1998
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, February 11, 1994

- Executive Order 11514, Protection and Enhancement of Environmental Quality, March 5, 1970, as amended May 24, 1977
- Modified Waters General Design Memorandum (GDM), 1992
- Draft Supplemental Modified Waters GDM, April 2000
- C-111 General Reevaluation Report (GRR) Environmental Impact Statement, 1994
- Real Estate Memorandum (REDM), November 1994
- 8.5 Square Mile Area Record of Decision, December 2000
- Supplemental C-111 GRR Environmental Impact Statement, 2002

D. RELEVANT GUIDANCE FROM COUNCIL ON ENVIRONMENTAL QUALITY (CEQ)

The establishment of this AMOU is consistent with the following guidance provided by the Council on Environmental Quality:

- Memorandum for Heads of Federal Agencies, “Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act” with Attachment 1: “Factors for Determining Whether to Invite, Decline, or End Cooperating Agency Status”, January 30, 2002
- Memorandum for Heads of Federal Agencies, “Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act”, July 28, 1999
- “The National Environmental Policy Act: A Study of its Effectiveness After Twenty-five Years”, January 1997
- “Environmental Justice: Guidance Under the National Environmental Policy Act”, December 10, 1997
- “Incorporating Biodiversity Considerations Into Environmental Impact Analysis Under the National Environmental Policy Act”, January 1993
- “Council on Environmental Quality Guidance Regarding NEPA Regulations”, 1983
- CEQ’s Forty Most Asked Questions Concerning NEPA Regulations, March 21, 1981

E. STATEMENT OF MUTUAL INTERESTS AND BENEFITS

All parties recognize they can benefit from collaboration on the CSOP EIS process, as well as from increased communication, disclosure of relevant information early in the analytical process, sharing of available data and staff expertise, improved coordination, avoidance of duplicated efforts, and proactive resolution of interagency conflicts. Additionally, the parties can benefit from engaging in collaboration to help achieve better outcomes for all parties while ensuring that each agency’s key mandates and legal requirements are adequately and appropriately met.

F. IT IS MUTUALLY AGREED AND UNDERSTOOD BY ALL PARTIES THAT:

I. BASIC ROLES.

- The **U.S. Army Corps of Engineers** is the lead agency for the CSOP EIS process with the sole and ultimate decision-making authority for the Record of Decision and primary responsibility for NEPA compliance, as well as preparation of the environmental impact statement. The Corps' mission is to provide engineering services to the nation, including the planning, designing, building, and operating of water resource and civil works projects. In accordance with this mission, the Corps began investigating the hydrologic problems in south Florida in the 1940's which resulted in their design and construction of a complex multi-purpose water management system designed to meet the needs of the region with regards to flood control, regional water supply for agricultural areas, urban areas and Everglades National Park, the preservation of fish and wildlife resources, the prevention of salt-water intrusion, navigation and recreation. The Corps has special expertise in all aspects of water resource engineering and management that includes meteorology, hydrology, planning, design, construction, the integration of project features and operations, and a detailed understanding of the operational capabilities and limitations of the water management system to contribute to a well-informed decision on CSOP.
- **Everglades National Park**, as the primary funder of the Modified Waters project, is a principal benefactor of the CSOP process. The Park's mission is to preserve unimpaired the natural and cultural values of Everglades National Park for the enjoyment, education, and inspiration of this and future generations, including a permanent wilderness preserving essential primitive conditions including the natural abundance, diversity, behavior, and ecological integrity of its flora and fauna. The Park has special biological, ecological, and hydrology expertise to contribute toward a well-informed decision on CSOP.
- The **South Florida Water Management District** is the local sponsor of the C-111 project and primary operational implementer of the CSOP decision. The mission of the South Florida Water Management District is to manage and protect water resources of the region by balancing and improving water quality, flood control, natural systems, and water supply. The District has special biological, ecological, and hydrology expertise, as well as detailed understanding of the capabilities and limitations of the regional water management system, to contribute toward a well-informed decision on CSOP.

- The **U.S. Fish and Wildlife Service** has legal responsibility to enforce the Endangered Species Act and to review proposed actions to determine whether they would result in jeopardy to any endangered species; and if so, how to mitigate or avoid that jeopardy situation. The Service has the responsibility to communicate its determinations to the lead agency through a Coordination Act Report, which is incorporated into the environmental impact statement. The Service has special biological and ecological expertise to contribute toward a well-informed decision on CSOP.

II. THE CORPS SHALL:

1. Serve as the lead agency for the CSOP EIS process with sole and ultimate decision-making authority for the Record of Decision and primary responsibility for NEPA compliance, as well as preparation of the environmental impact statement.
2. Designate the Park, the District, and the Service as cooperating agencies in the CSOP EIS process.
3. Fully utilize the relevant data and assessments provided by the Park, the District, and the Service in support of the decision-making process.
4. Seek agreement with the Park, the District, and the Service on key stages of the NEPA process, including: development of the Purpose and Need Statement for the proposed action, development of the Goals and Objectives for the proposed action, development of a range of alternatives, modeling and analysis of the alternatives, consideration of public comments, and development of a preferred alternative.
5. Utilize mediation to resolve important disagreements among the four sponsoring agencies involving issues during the NEPA process.
6. Elevate unresolved issues to the next highest level of decision-making within the District, the state, the U.S. Fish and Wildlife Service, or Everglades National Park when three of the four agencies have agreed that they are at an impasse, which requires elevation to resolve.
7. Exercise its independent authority regarding issues of key importance to the other parties to this agreement only after mediation and elevation efforts, pursued according to a mutually agreed upon schedule and deadline, have failed to resolve an impasse.
8. Fully consider the views of the Park, the District, and the Service in developing its Record of Decision.
9. Work with the Park, the District, and the Service to collaboratively monitor the impacts of its decision.

III. THE PARK, THE DISTRICT, AND THE SERVICE SHALL:

1. Serve as cooperating agencies and joint sponsors with the Corps of a collaborative CSOP EIS process.
2. Contribute data and information relevant to the CSOP decision-making process.
3. Cooperate with the Corps in providing neutral facilitation and mediation support for the CSOP EIS process, as mutually determined is required.
4. Provide adequate staff resources to ensure active participation on the interagency CSOP Core Planning Team ("Team") and its Sub-Teams to provide for timely development and review of draft documents.

IV. THE CORPS, THE PARK, THE DISTRICT, AND THE SERVICE SHALL:

1. Work collaboratively with each other through the Team to develop a statement of the purpose and need for the proposed action, the goals and objectives for the proposed action, the process for scoping relevant issues, the process for involving other interested and affected entities, the schedule for completion of milestones, development of a range of alternatives, modeling and analysis of alternatives, consideration of public comments, development of a preferred alternative, and monitoring the impacts of the decision.
2. Designate appropriate representatives with relevant technical expertise to the Team and any Sub-Teams established, which will seek to develop options for consideration by agency policy decision-makers in accordance with the respective decision-making requirements of each agency.
3. Seek the endorsement and active support for their participation in a collaborative CSOP EIS process within their own hierarchies and up any relevant chains-of-command or necessary levels of review and approval for decisions during the CSOP process.

V. INTERAGENCY CSOP CORE PLANNING TEAM.

Each party shall designate representatives with relevant technical expertise to the Team and any Sub-Teams established, which will seek to develop options for consideration by agency policy decision-makers in accordance with the respective decision-making requirements of each party.

VI. GROUND RULES FOR INTERAGENCY COLLABORATION ON CSOP.

The set of ground rules for interagency collaboration attached as Exhibit "A" to this AMOU shall govern interagency activities in the development of options on the CSOP.

G. STANDARD CONDITIONS:

- I. **AUTHORITIES.** Nothing in this AMOU shall be construed to extend the jurisdiction or decision-making authority of any party to this AMOU beyond that which exists under current laws and regulations. Nothing in this AMOU shall be construed as limiting or affecting the authority or legal responsibility of any party, or as binding any party to perform beyond the respective authority of each, or to require any party to assume or expend any specific sum of money. The provisions of this AMOU are subject to the laws and regulations of the State of Florida, the laws of the United States, and the regulations of the Department of the Army and the Department of the Interior, as they may be applicable. Nothing in this AMOU shall be construed as affecting the decision-making requirements of any party or impairing the independent judgment of each party regarding policy decisions.
- II. **LEGAL RIGHTS AND REMEDIES.** Nothing in this AMOU shall be construed to alter the legal rights and remedies that each party would otherwise have. No party waives any legal rights or defenses by entering into this AMOU or participating in the process contemplated hereby. This AMOU may not be used as evidence by or against any party in any legal proceeding, whether now existing or subsequent.
- III. **SOVEREIGN IMMUNITY.** The State of Florida, political subdivisions and the agencies of the federal government do not waive their sovereign immunity by entering into this AMOU, and each fully retains all immunities and defenses provided by law with respect to any action based on or occurring as a result of this AMOU.
- IV. **SEVERABILITY.** Should any portion of this AMOU be judicially determined to be illegal or unenforceable, the remainder of the AMOU shall continue in full force and effect, and any party may renegotiate the terms affected by the severance.
- V. **THIRD PARTY BENEFICIARY RIGHTS.** The parties do not intend to create in any other individual or entity the status of third party beneficiary, and this AMOU shall not be construed so as to create such status. The rights, duties and obligations contained in this AMOU shall operate only among the parties to this AMOU, and shall inure solely to the benefit of the parties to this AMOU. The provisions of this AMOU are intended only to assist the parties in determining and performing their obligations under this AMOU.

- VI. NON-FUND OBLIGATION DOCUMENT.** This AMOU is neither a fiscal nor a funds obligation document. Any endeavor or transfer of anything of value involving reimbursement or contribution of funds between the parties to this instrument will be handled in accordance with applicable laws, regulations, and procedures including those for Government procurement and printing. Such endeavors will be outlined in separate agreements that shall be made in writing by representatives of the parties and shall be independently authorized by appropriate rules, policies, and statutory authority. This AMOU does not provide such authority. Specifically, this AMOU does not establish authority for noncompetitive award to the cooperator of any contract or other agreement. Nothing herein constitutes a binding commitment to fund any of the proceedings encompassed by the AMOU. Any specific cost sharing or funding shall be executed separately through other funding mechanisms, as deemed necessary and appropriate by each of the signatories.
- VII. PARTICIPATION IN SIMILAR ACTIVITIES WITH OTHER ENTITIES.** This AMOU in no way restricts any of the parties from participating in similar activities with other public or private agencies, organizations, and individuals.
- VIII. MODIFICATION.** Any party may request changes in this AMOU. Any changes, modifications or amendments to this AMOU which are mutually agreed upon by and among the parties to this AMOU shall be incorporated by written instrument, executed and signed by all parties to this AMOU.
- IX. TERMINATION.** Any party to this AMOU may terminate in writing its participation in this agreement in whole, or in part, at any time before the date of expiration, with 30 days notice to the other parties.
- X. ENTIRETY OF AGREEMENT.** This AMOU, consisting of eight (8) pages, represents the entire and integrated agreement among the parties and supersedes all prior negotiations, representations and agreements, whether written or oral.
- XI. PRIMARY CONTACTS.** The primary agency contacts for carrying out the provisions of this AMOU shall be the CSOP Project Managers for each agency as designated in writing by such agency.
- XII. EFFECTIVE DATE.** The effective date of this AMOU is the date of the signature last affixed to these pages.
- XIII. COMPLETION DATE.** Unless terminated sooner, this AMOU is effective through December 31, 2007, at which time it will expire unless renewed by the parties through a duly executed amendment hereto.

XIV. EFFECT ON PRIOR MEMORANDUM OF UNDERSTANDING. It is the intent of this AMOU to supersede and replace the original MOU (C-13447) relating to this same subject entered into by the parties.

H. SIGNATURES

In witness whereof, the parties to this AMOU through their duly authorized representatives have executed this AMOU on the dates set out below, and certify that they have read, understood, and agreed to the terms and conditions of this AMOU, as set forth herein.

U.S. Army Corps of Engineers

Everglades National Park

Col. Robert M. Carpenter Date
District Engineer

Maureen Finnerty Date
Superintendent

South Florida Water Management District

U.S. Fish and Wildlife Service

Nicholas J. Gutierrez, Jr. Date
Chairman, SFWMD Governing Board

James J. Slack Date
South Florida Field Supervisor

SFWMD PROCUREMENT APPROVED:

Signature Date

SFWMD OFFICE OF COUNSEL APPROVED:

Signature Date

APPENDIX A2

OPERATING AGREEMENT FOR THE ST. CROIX CROSSING PROBLEM-SOLVING PROCESS

PURPOSE

1. To facilitate a common understanding of the transportation, environmental and historic preservation issues among the government and non-government stakeholders;
2. To define the various solutions (including transportation alternatives) to these issues by exploring the advantages and disadvantages of each solution
3. To arrive, if possible, at a consensus
4. To reach agreement among permitting/cooperating/core agencies on the components of the supplemental draft environmental impact statement for the long-term bridge project and on the related regulatory conclusions, among them:

Section 7 of the Wild and Scenic River Act
Section 106 of the Historic Preservation Act
Section 4f of the USDOT ACT
Local concurrence

Specific issues under consideration include, but will not be limited to:

New Bridge Alternatives
Long-Term Alternatives for Lift Bridge
Criteria for Selecting a Preferred Alternative
Integration of Federal Mandates
Mitigation Associated with Alternatives
Local Concurrence for Transportation Projects

ROLES

Group Members

The group members will:

- engage in a thoughtful, thorough deliberation
- advocate for the interests of his/her agency
- share relevant information with the other group members

- keep constituencies informed and advocate within constituent organizations for support of the group's work
- keep the group informed about constituent perspectives
- work to identify promising options
- openly discuss and evaluate those options
- refrain from undermining group recommendations and reports
- secure approval within the organization for permission (within limits) to negotiate an agreement
- explicitly inform the group when the limits of authority are reached
- elevate issues within the organization as a way of addressing the limitation

Membership

The group will include:

Minnesota Department of Transportation*
 Wisconsin Department of Transportation*
 Wisconsin Department of Natural Resources*
 Minnesota Department of Natural Resources*
 Minnesota State Historic Preservation Office*
 Wisconsin State Historic Preservation Office*
 City of Stillwater*
 City of Oak Park Heights*
 National Park Service*
 Federal Highway Administration*
 US Army Corps of Engineers*
 US Coast Guard*
 US EPA*
 Advisory Council on Historic Preservation*
 US Fish and Wildlife Service*
 Preservation Alliance of Minnesota
 Stillwater Historic Preservation Commission
 St. Croix River Association
 Friends of the St. Croix
 Stillwater Area Chamber of Commerce
 Sierra Club
 St Croix Alliance for an Interstate Bridge
 St Croix County Highway Commission
 Town of St. Joseph
 Stillwater Lift Bridge Association
 Board of Realtors
 Minnesota Center for Environmental Advocacy

Those named above will attend the meetings and will not send alternates unless absolutely necessary, and then only if the alternate is fully advised of the group's work and the group is advised in advance.

If the full group – permitting/cooperating/core agency members and other stakeholders – cannot reach consensus, the permitting/cooperating/core agency representatives, as enumerated above (*), are expected to participate in the final consensus-building effort as indicated in the schedule.

Should any organization or representative wish to withdraw from the process, they will provide a written explanation to the group.

Mediators

Mediators from RESOLVE will design work session agendas and conduct the meetings. The mediators will remain impartial – not favoring any particular outcome. The mediators are responsible to the whole group and not to one member or interest. RESOLVE will distribute draft meeting summaries and provide an opportunity for the group to review and finalize each summary. Final summaries will be made available to the public.

Public Input

The group will work with the lead transportation agencies (Minnesota Department of Transportation and Wisconsin Department of Transportation) to hold public meetings that satisfy NEPA, WEPA and MEPA public involvement requirements and the public involvement requirements of other laws and regulations. These include scoping meetings; meetings to discuss alternatives prior to selection of a preferred alternative and the Draft Supplemental Environmental Impact Statement (DEIS); public meetings to present and take feedback about the preferred alternative; and a formal public hearing on the DEIS. The group may advise the agencies to conduct additional public involvement.

DECISION MAKING AND DELIBERATION

The group's highest goal is consensus. A consensus agreement is one that all group members can support, built by identifying and exploring all parties' interests and by developing an outcome that satisfies these interests to the greatest extent possible. To enhance creativity during meetings, individuals are not expected to restrict themselves to the prior positions held by their organizations, agencies or constituencies. The goal of the meetings is to have frank and open discussion of the topics in question and the options to address the topics. Therefore, ideas raised in the process of the dialogue, prior to agreement by the whole group,

are for discussion purposes only and should not be construed to reflect the position of a member or to prematurely commit the group.

If consensus is not possible, the permitting/cooperating/core agencies will work to build a consensus of their own, using the whole group's deliberation as the basis for their work. Finally, if full agency consensus is not possible, the lead agencies may use the group's work to make decisions in line with their regulatory authority and in keeping with the limitations of that authority.

The participants agree to use this venue to attempt to resolve all questions associated with the St. Croix Crossing. At the same time, the participants recognize that there are other venues for addressing their concerns, including the formal comment periods associated with state and Federal environmental review processes. Participation in this problem-solving process does not preempt participation in any other venue.

Federal environmental streamlining offers the opportunity for Federal agencies to coordinate their work and to resolve differences that could impede the consensus-building work. In addition, state agencies are expected to coordinate their efforts and resolve differences at the highest levels of state government. The policy advisory group, specified below, is one venue for resolving any differences.

COMMUNICATION WITH OTHER GROUPS, INDIVIDUALS AND THE MEDIA

Group members wish to maintain an environment that promotes open, frank and constructive discussion. Members recognize that such an environment must be built on mutual respect and trust, and each commits to avoid actions that would damage that trust. Therefore, the meeting sessions of the full group and subcommittees are closed working sessions unless the group decides otherwise.

In communicating about the group's work, including communicating with the press, each member agrees to speak only for herself or himself; to avoid characterizing the personal position or comments of other participants; and to always be thoughtful of the impact that specific public statements may have on the group and its ability to complete its work. No one will speak for any group as a whole without the consensus of that group. Should anyone wish the group to release information to the press, the group will do so only through a mutually agreeable statement, drafted by consensus of all of that group's members.

The mediators and the technical advisory team will assist the group in scheduling and conducting press briefings and public involvement events. The problem-solving schedule includes milestones for public participation. The group will also work to keep elected

officials informed of the progress of the problem-solving process, including periodic electronic updates.

DISCUSSION GUIDELINES

The following guidelines encourage productive deliberation. Group members will commit to best efforts at following them and will give the mediators the authority to enforce them:

OPENNESS

- To other points of view
- To outcome
- To all representatives

LISTENING

- Focus on each speaker rather than prepare your response
- No interruptions

FAIRNESS

- Speak briefly
- Everyone participates

RESPECT

- Disagree without being disagreeable
- No personal attacks

COMMITMENT

- Prepare for each session
- Attend each session
- Honor the agenda and make agenda changes with the whole group
- Begin and end on time
- Get up to speed if didn't attend

All parties agree to act in good faith in all aspects of the group deliberations, to conduct themselves in a manner that promotes joint problem solving and collaboration, and to consider the input and viewpoint of other participants. Members agree not to use specific offers, positions, or statements made by another member during non-public discussions for any other purpose not previously agreed to in writing by the Members involved. Personal attacks will not be tolerated. Negative generalizations are not productive and have the potential to impede the ability of the group to reach consensus. All members will be given an equal opportunity to be heard with the intention of encouraging the free and open exchange of ideas, views, and information prior to achieving consensus.

Members and other participants are requested not to bring beepers or cellular telephones into the meetings.

SUBCOMMITTEES

It will be necessary for the groups to establish subcommittees to explore topics, develop proposals, resolve differences, etc.

Process Advisory Committee

The mediator will establish a Process Advisory Committee to assist the mediators to develop agendas and guide the decision-making process.

Technical Advisory Team (Project Staff Team)

The staff team, including transportation, historic preservation and environmental interests and any consultants hired to assist in the problem-solving process, will work to provide important information to the group to successfully accomplish meeting agendas.

Policy Advisory Team

A high-level team of agency representatives will convene periodically to measure the progress of the consensus-building efforts, assess the relationship between the negotiation outcomes and the regulatory and policy requirements. The team will work to resolve policy differences that the group may elevate to them.

Other Meetings and Discussions

Meetings in support of the process (whether a meeting among a subset of agencies or a meeting of advocates with a shared perspective) are expected and are encouraged so long as they do not preempt the group's deliberations.

DRAFT SCHEDULE AND MILESTONES

As part of this process, all participating organizations recognize that they are part of a decision-making process and not a study or data collection effort. Further, they accept that funds used for study come from the same source as the funds for the transportation project and for mitigation. In keeping with this perspective, all agree to use existing information whenever possible, to streamline necessary data collection efforts, to allocate financial resources carefully and to work diligently to make the following schedule possible:

Problem Solving Group Process	
Activity	Dates
Opening Meeting <ul style="list-style-type: none"> • Affirm purpose, process, participation, etc. • Meeting schedule 	June 10, 2003
Meeting #2 <ul style="list-style-type: none"> • Range of Options 	June 30, 2003
Meeting #3 <ul style="list-style-type: none"> • Transportation Options – New and Lift Bridges • Environmental Review 	July, 2003
Meeting #4 <ul style="list-style-type: none"> • Transportation Options • Environmental Review • Mitigation Options • Review – Updated Draft Scoping Document (Revised, Amended, Supplemental) and Scoping Decision Document 	September, 2003
Meeting #5 <ul style="list-style-type: none"> • Evaluating Options 	October, 2003
Meeting #6 <ul style="list-style-type: none"> • Alternatives Evaluation 	November, 2003
Meeting #7 <ul style="list-style-type: none"> • Alternatives Evaluation • Building on the Most Viable Options 	January, 2004
Meeting #8 <ul style="list-style-type: none"> • Consensus Building – Preferred Alternative 	February, 2004
Meeting #9 <ul style="list-style-type: none"> • Consensus Building – Preferred Alternative 	March, 2004
Meeting #10 <ul style="list-style-type: none"> • Consensus Building – Preferred Alternative 	July, 2004
Meeting #11 <ul style="list-style-type: none"> • Revisions Based on Public Comment • Implementation Issues • Final Agreement 	October, 2004

APPENDIX A-3

**MEMORANDUM OF UNDERSTANDING
NEPA ENVIRONMENTAL IMPACT STATEMENT REVIEWS AND
PERMITTING FOR THE PROJECT**

Between

(Lead Agencies)

And

(Cooperating Agencies)

And

(Applicant)

I. Statement of Intent

State that the Memorandum of Understanding (MOU) sets forth responsibilities and schedules that will lead to effective and timely National Environmental Policy Act (NEPA) review involving an environmental impact statement (EIS) or supplemental environmental impact statement (SEIS) and agency permitting decisions for *Applicant's* _____ *Project* (_____ Project)

II. Background and Purpose

Describe the background and purpose of the project. Provide language for the draft Purpose and Need section of the EIS or SEIS.

III. Scope

State that the MOU covers the analysis of the environmental impacts of the project under the NEPA process, sets forth the processes and procedures that will be followed for related permits and consultations, and establishes how permitting actions and schedules will be coordinated.

IV. Authorities

List all legal authorities that will be covered by the MOU, including NEPA.

V. Lead, Cooperating, and Participating Agencies

Identify the lead, cooperating and participating agencies and set forth the concept of an interagency coordinating committee.

VI. Responsibilities

A. Lead Agency Responsibilities

This section should list the principal responsibilities of the lead agency or agencies. The lead agency or agencies shall:

1. Commit to adhering to a schedule, as set forth in an exhibit to the MOU, unless modified by agreement of cooperating agencies and applicant;
2. Identify project manager;

3. Identify cooperating agencies and establish duty to include all such entities early in the NEPA process to avoid delays;
4. Define role of lead agency or agencies for making final determination on EIS/SEIS content, including data, analyses, and conclusions;
5. Establish good faith effort responsibility of lead agency to identify and achieve timely completion of consultations and coordination under other applicable laws, including preparation of schedules to guide such reviews;⁴⁸
6. Specify lead agency or agencies' consultation responsibilities under other laws, including duty to designate applicant as nonfederal representative for appropriate roles (e.g., Endangered Species Act) and to include applicant, as appropriate, in meetings;
7. Confirm responsibility of lead agency to make a good faith effort to achieve full and timely participation of cooperating agencies in accordance with established schedule;
8. Define procedures for ensuring confidentiality of sensitive information submitted by applicant;
9. Develop in consultation with the applicant and third party EIS contractor (if applicable) a request for information (RFI) process specifying the criteria and documentation for obtaining information from the applicant to ensure timely, focused and efficient information gathering;
10. Develop and maintain documentation procedures for the administrative record; and
11. State that nothing in this MOU shall be construed as altering, or in any way limiting, any agency's ability or responsibility to act in accordance with all applicable federal and state laws and regulations.

⁴⁸This should cover all applicable federal, state, local, tribal procedures that apply, including: Endangered Species Act, Fish and Wildlife Coordination Act, Coastal Zone Management Act, National Historic Preservation Act, Marine Mammal Protection Act, Clean Water Act, Clean Air Act, CERCLA, Fishery Conservation and Management Act, Environmental Justice (Executive Order 72898), Tribal Coordination (Executive Order 13175), Marine Protected Areas (Executive Order 13158), Migratory Birds (Executive Order 13186), etc.

B. Cooperating Agency Responsibilities

This section of the MOU should define the responsibilities of cooperating agencies. The cooperating agencies shall:

1. Identify any actions or consultation requirements applicable to the action early in the NEPA process;
2. Designate the lead official responsible for participating in the EIS/SEIS process;
3. Commit to adhere to schedule established in the MOU, subject to change in accordance with defined procedures;
4. Commit to confidentiality requirements;
5. Commit to coordinating public notice requirements with corresponding steps in NEPA process; and
6. Establish good faith effort commitment to raise all issues early in NEPA process to avoid delay and inefficiency.

C. Applicant Responsibilities

This section should define the duties of the applicant to submit all required applications and data, to participate effectively throughout the NEPA review, and to pay all appropriate NEPA costs. The applicant shall:

1. Provide a sufficient application, including any accompanying environmental report;
2. Identify project coordinator for applicant;
3. Serve as designated nonfederal representative under ESA and prepare a biological assessment;
4. Serve in the defined role for other procedures, such as preparation of essential fish habitat assessment, historic preservation review, etc.;
5. Commit to providing all reasonably justifiable, nonprivileged technical or environmental information needed to prepare an EIS/SEIS, as determined by lead agency, in consultation with cooperating agencies;

6. Commit to necessary funding;
7. Commit to provide timely responses to data requests and provide comments on draft documents; and
8. Serve the defined role of applicant in public meeting coordination.

VII. EIS Procedures

This section would establish key steps in the EIS/SEIS preparation process. The objective is to ensure adequate information gathering, full and careful agency and public review, objective EIS/SEIS preparation, adherence to a defined schedule, and an appropriate role for the applicant.

A. Coordinating Committee

A "coordinating committee" will be established to guide EIS/SEIS preparation for large-scale projects. This committee will consist of the lead agency, project coordinators for cooperating agencies, and the applicant (except on issues not appropriate for applicant involvement). The coordinating committee shall:

1. Establish a regular schedule for coordinating committee meetings;
2. Define duties of coordinating committee to include: tracking EIS/SEIS in relation to established schedule; reviewing draft documents; selecting EIS/SEIS contractor; and coordinating public review, etc.; and
3. Identify issues not appropriate for applicant involvement, and relevant authority for this conclusion.

B. EIS Contractor

1. Require applicant to prepare a list of qualified contractors and submit to lead agency;
2. Require lead agency to forward list to coordinating committee for review, bidding process, and ranking;
3. Require coordinating committee to recommend a preferred EIS/SEIS contractor or to reject all contractors on the list to applicant through lead agency;

4. Provide that applicant will decide whether to accept recommendation or seek further review of additional contractors by coordinating committee;
5. Require that, once the EIS/SEIS contractor has been selected, the lead agency will secure conflict of interest statements from the contractor;
6. Define procedures to ensure proper communication between applicant and EIS/SEIS contractor; and
7. Provide that the contract between the Applicant and the contractor, and any subcontracts thereunder, shall be consistent with the provisions of the MOU and shall specifically incorporate the provisions herein which address the conduct of the contractor.

C. Scoping Process

After the contractor is selected, the lead agency, in consultation with cooperating agencies, the contractor, and the applicant, will conduct and finalize scoping, if required, for the EIS/SEIS. The lead agency shall:

1. Publish a Notice of Intent to prepare an EIS/SEIS in the Federal Register and local publications;
2. Establish a reasonable schedule for meetings among cooperating agencies;
3. Establish a reasonable schedule for public hearings to obtain public input on the appropriate scope of the EIS/SEIS early in the NEPA process;
4. Define the necessary baseline studies; and
5. Publish a scope of work that includes a detailed description of all work to be performed, the persons responsible for performing the work, the estimated work hours required for each task, and the schedule for performing each task.

D EIS/SEIS Availability

1. Define procedures to be followed for draft and final EIS/SEIS availability and distribution including public meetings;.

2. Establish website arrangements;
3. Define procedures to be used for assembling and reviewing all public comments on scoping and the draft EIS/SEIS;
4. Provide for applicant to have an appropriate role in responding to comments on draft EIS/SEIS.

APPENDIX B: SELECTED CASE STUDIES

This appendix provides case examples of situations in which collaboration has been used in the context of NEPA. It is provided here for the convenience of the reader.

**Case: Everglades Interim Operating Plan Interagency Collaboration -
U.S. Army Corps of Engineers, National Park Service, U.S. Fish and
Wildlife Service, South Florida Water Management District**

Brief Case Description

In early 2001, the U.S. Army Corp of Engineers had already completed a Draft Environmental Impact Statement (DEIS) for an Interim Operational Plan (IOP) to protect the endangered sparrow until the Combined Structural and Operational Plan (CSOP) for the long-delayed Modified Water Deliveries to the Everglades National Park and C-111 Canal projects could be completed. The DEIS had not been well received by other agencies, and the President's Council on Environmental Quality (CEQ) asked the Corps to complete a Supplemental EIS (SEIS) within a nine-month timeframe. The other agencies involved included Everglades National Park, U.S. Fish and Wildlife Service, and the South Florida Water Management District; the Corps needed their cooperation to complete the SEIS. Several months of negotiations facilitated by the U.S. Institute for Environmental Conflict Resolution and a team of contracted mediators led to an interagency agreement on a preferred alternative, which was incorporated into a Supplemental EIS that was then issued for public comment. The preferred alternative was refined based on stakeholder comments, and an FEIS and ROD were issued.

The collaborative group agreed on protocols for monitoring. The agencies involved agreed that a high quality decision resulted and it is being implemented even while under litigation. Continued mediation assistance is provided on an as-needed basis to deal with clarification that are required in implementing the plan. Specific on-the-ground improvements have resulted, since the Corps has expedited the construction of some features to enhance the existing water delivery system. Institutionalized interagency teams have resulted facilitating much better working relationships between the agency staff.

The four agencies are currently engaged (Fall 2006) in a multi-stakeholder EIS process for the CSOP that will actively involve other state, local, and tribal governments, as well as concerned stakeholders and nongovernmental organizations. The four agencies collaboratively developed a scope of work to produce a new hydrologic model for use on the CSOP.

Scope of Case

Regional Ecosystem-level

Themes of Interest

Conflict emerged in a NEPA process.

Interagency conflict over the use and interpretation of hydrologic modeling results relating to emergency water management decisions designed to protect the endangered Cape Sable seaside sparrow.

Existing long-standing interagency conflict relating to use and interpretation of hydrologic modeling results. As part of the process, parties have begun a collaborative multi-stakeholder EIS process for the CSOP.

Key Stakeholders

Federal Agencies:

- Army Corps of Engineers
- Everglades National Parks
- U.S. Fish and Wildlife Service

State/Local Agencies

- South Florida Water Management District

Environmental Conflict Resolution Principles Exemplified

- Informed Commitment – Agency leadership and staff from federal state and local levels committed to engage in a collaborative process.
- Balanced Representation – This interagency collaborative process engaged all the federal agency stakeholders and the state water management district. From the initial assessment, it was determined that the agencies themselves needed to work together and address internal issues before taking the next step to engage external stakeholders in a broader public collaborative effort (which is now underway).
- Informed Process – The focus of the interagency collaborative effort was to seek agreement on how to share, test and apply relevant information and resolve disagreements on the appropriate hydrologic modeling for the project.

Results and Accomplishments

- The agency participants determined to limit involvement to government employees and that FACA did not apply. However, FACA, as well as state “government-in-the-sunshine” requirements have been raised as issues in subsequent unsuccessful litigation challenging the resulting NEPA decision. While there may be advantages to limiting negotiations to agencies with jurisdictional authority, there are also disadvantages of inadequate engagement of other external governmental and nongovernmental stakeholders.
- While the draft EIS prepared by the lead agency gave the participants a starting point to work from, the parties determined that it would have been better for them to work on developing alternatives together from the start.
- More intensive coaching and collaborative skills development with participants could have improved the process.

- Strategic leadership changes and staff assignments enhanced the likelihood for a successful outcome; unanticipated personnel changes interfered with progress.
- Encouragement by CEQ was a decisive factor in the agencies pursuing a conflict resolution approach using the assistance of third-party neutrals.
- Several key staff with effective collaborative problem-solving skills were crucial in successfully forging agreements with their counterparts.

Contact Information

For more information contact U.S. Institute for Environmental Conflict Resolution, 520-670-5299, www.ecr.gov

See also the National Environmental Conflict Resolution Advisory Committee's Final Report to the U.S. Institute for Environmental Conflict Resolution, April 2005, at <http://www.ecr.gov/necrac/reports.htm>.

Case: St. Croix River Crossing Controversy – 2001-2006
Federal Highway Administration, Department of Interior, States of Minnesota and Wisconsin

Brief Case Description

In the 1950s, Stillwater, MN and Houlton, WI began discussing how to improve transportation between the two towns, which are connected by an historic lift bridge over the St. Croix River, a waterway within the Wild and Scenic River System. In 1995, a proposal to build a new bridge and remove the lift bridge was accepted, then successfully challenged in court.

By 2000, the intersection of three public policy goals—enhancement of transportation services, preservation of historic resources, and protection of a wild and scenic river—had produced gridlock among the Federal Highway Administration, U.S. Army Corps of Engineers, U.S. Coast Guard, U.S. Environmental Protection Agency, National Park Service, U.S. Fish and Wildlife Service, Advisory Council on Historic Preservation, and the Depts. of Transportation, Depts. of Natural Resources, and State Historic Preservation Offices of both MN and WI.

In 2001, the affected parties requested the assistance of the U.S. Institute for Environmental Conflict Resolution. The U.S. Institute conducted an initial assessment to determine if a negotiated agreement would be feasible and, if so, how to proceed.

Based on recommendations from the assessment, the parties agreed to participate in a collaborative problem-solving process. In 2002, a group of 27 agency and non-agency stakeholders began meeting to find a transportation solution.

Scope of Case

Minnesota & Wisconsin

Themes of Interest

The mediated agreement is innovative in that many of the non-agency stakeholders will continue to be involved in collaborative governance via oversight and implementation of the mitigation measures associated with the final agreement.

This case highlights both the importance and the challenges of effectively integrating collaborative problem solving into NEPA review processes.

Key Stakeholders

Minnesota Department of Transportation*

Wisconsin Department of Transportation*

Wisconsin Department of Natural Resources*
Minnesota Department of Natural Resources*
Minnesota State Historic Preservation Office*
Wisconsin State Historic Preservation Office*
City of Stillwater*
City of Oak Park Heights*
National Park Service*
Federal Highway Administration*
US Army Corps of Engineers*
US Coast Guard*
US EPA*
Advisory Council on Historic Preservation*
US Fish and Wildlife Service*
Preservation Alliance of Minnesota
Stillwater Historic Preservation Commission
St. Croix River Association
Friends of the St. Croix
Stillwater Area Chamber of Commerce
Sierra Club
St Croix Alliance for an Interstate Bridge
St Croix County Highway Commission
Town of St. Joseph
Stillwater Lift Bridge Association
Board of Realtors
Minnesota Center for Environmental Advocacy

Results and Accomplishments

The five-and-a-half-year long process resulted in an agreement to retain the lift bridge as a pedestrian and bicycle crossing and construct a new bridge for vehicular traffic. To address the natural, social, and cultural impacts of the new bridge, a comprehensive mitigation package was developed.

The mitigation measures went significantly beyond compensating for the direct impacts of the new bridge (wetland replacement, relocation of threatened and endangered species, and bluffland restoration), to include removal of visual intrusions from the waterway, addition of a river access point, funding for lift bridge preservation, designation of Stillwater as a historic district, capacity-building for growth management in St. Croix County, and a basin-wide water quality study.

Relationships and communication among the stakeholders improved remarkably during the problem-solving process. In the words of one stakeholder, *“We were able to spend the time necessary to get over our natural inclination to not trust people from the other side. [...] We*

had enough time and enough space to come to a conclusion that everybody could feel comfortable with.”

Contact Information

For more information contact U.S. Institute for Environmental Conflict Resolution,
520-670-5299, www.ecr.gov

**Case: US 93 Corridor – Montana - U.S. Department of Transportation,
Federal Highway Administration**

Brief Case Description

The US 93 Corridor consists of a series of complex reconstruction projects along the existing US 93 Corridor between Hamilton and Whitefish, Montana. The highway traverses national and State forestland, national wildlife refuges, and ecosystems with regionally and nationally important wildlife and habitat resources. The route travels through several Rocky Mountain valleys, crosses the Flathead Indian Reservation, and links major recreational areas to major population centers. Montana began work on upgrading US 93 in the 1980s, and key issues to resolve have included induced growth, adverse impacts to the natural environment, impacts to tribal cultural and spiritual sites, wildlife linkage areas, wetlands, right-of-way acquisition on tribal land, and access control.

Scope of Case

US 93 Corridor was selected as a Priority Project under Executive Order 13274, and as such receives national focus by not only DOT, but other Federal agencies.

Themes of Interest

At the project-specific level, during and after NEPA process. The 1996 ROD deferred construction until MDT, FHWA, and Confederated Salish and Kootenai Tribes (CSKT) could agree on the appropriate design that would address social, economic, and environmental impacts. This was an explicit “adaptive management” strategy that allowed a NEPA approval to be given but conditioned project implementation on post-approval collaboration. In 2000, part of the 3 governments’ shared vision was the understanding that environmental and cultural issues had to be linked to highway safety and capacity. It was agreed that the new highway would be designed with the idea that the road is a visitor and should respond to and be respectful of the land and Spirit of Place (a continuum of everything on the reservation that is seen and unseen, touched and felt and traveled through). Rebuilding trust, honor, and mutual respect among the governments allowed place-sensitive design strategies to be successful. Current issues to be addressed center on the requirements for wetland mitigation resulting from construction on the Flathead Indian Reservation of the CSKT. Specifically, discussions are ongoing between CSKT and the Army Corps of Engineers relating to obtaining assurances that wetland mitigation sites will be protected in perpetuity.

Key Stakeholders

Confederated Salish and Kootenai Tribes, Montana DOT, FHWA, USFS, EPA, USACE, BIA, USFWS, Counties, private parties and stakeholders, and the public

Environmental Conflict Resolution Principles Exemplified

- Balanced Representation
- Group Autonomy
- Accountability

Results and Accomplishments

Montana DOT has learned that a collaborative environmental review process can produce safe, higher capacity highways that are welcomed by communities. US-93 could have been a standard straight four-lane highway with destructive impacts on the community, yet MDT, Federal agencies, tribes, citizen groups, and consultants did an exemplary job of developing this road to fit more harmoniously into the landscape. During the discussions, the connection between the tribal culture and wildlife habitat preservation became very evident; this led to innovative wildlife crossings being incorporated into the project. The US 93 corridor could become a model for delivering timely, environmentally sound transportation projects.

**Case: Collaborative Environmental and Transportation Agreement for Streamlining (CETAS)
Federal Highway Administration**

Brief Case Description

After the passage of the Transportation Equity Act for the 21st Century (TEA-21), the number of transportation projects in Oregon doubled. To streamline the review process, in 1996 Oregon merged its NEPA and Section 404 processes. The Collaborative Environmental and Transportation Agreement for Streamlining (CETAS) Group, formed in June 2000, committed to promoting environmental stewardship while providing for a safe and efficient transportation system.

Transportation and resource agencies in Oregon discuss issues early in the NEPA process through regular working group meetings, fostering relationships built on trust. Decision making is by consensus. Elevation to the next level of decision-makers within the agencies occurs on the rare occasion when consensus is not reached. The group does not have a neutral facilitator; meetings are led by ODOT participants.

Early resource agency involvement accelerates the NEPA process by avoiding agency conflicts and subsequent permit delays during final design, allowing projects to be completed in budget and on time. Efficiency in the project permitting process is achieved without compromising agency missions. Obstacles had to be overcome. For example, some resource agencies did not have the staff to participate. ODOT now funds three TEA-21 coordinator positions at NMFS, one position at FWS, and three positions at the Oregon State Department of Fish and Wildlife.

Scope of Case

Transportation projects in Oregon

Themes of Interest

The CETAS process covers the whole NEPA spectrum, beginning with Purpose and Need, continuing through alternatives, criteria for selection of a preferred alternative, and identification of the preferred alternative. Beginning with Purpose and Need is a key point in the success of the project. So far in the process, there has been one example of the group not being able to reach consensus, and this was on identification of a preferred alternative. The group had agreed on criteria for selection, but thought that it would lead to a different outcome. For this disagreement, an elevation process was developed whereby the next level of decision-makers within the agency attempts to reach consensus; this process will now be used if lack of consensus occurs in the future.

Key Stakeholders

Participating agencies include the federal and state Departments of Transportation, as well as a variety of other State and Federal agencies.

Environmental Conflict Resolution Principles Exemplified

- Clear goals, objectives, and expectations defined
- Responsible and sustained engagement of all parties
- Structured process design to facilitate timely productive and effective engagement
- Process consistent with existing laws and regulations, agency missions, policies and legislative parameters

Results and Accomplishments

ODOT was able to obtain permits in one week to build a temporary culvert in place of a failing bridge, allowing emergency equipment such as fire trucks to reach a part of eastern Oregon. The culvert was removed in time for local endangered fish to spawn, and the bridge repaired in an environmentally sound manner.

Case: San Juan National Forest, Southern Colorado
USDA Forest Service

Brief Case Description

This multi-stakeholder process was convened by the USDA Forest Service along with county governments, the Ft. Lewis College Office of Community Services (OCS) and others, for the purpose of developing a land use plan for the San Juan National Forest in southwestern Colorado. While the process was open to the public at large, the Bureau of Land Management (BLM), as well as several State and local agencies have been involved in the effort. The process built on an earlier collaborative effort for ponderosa pine restoration that involved many of the same partners.

The process began during the pre-NEPA and scoping stages, and is continuing to evolve all the way through the NEPA process for the San Juan National Forest Plan revision. Two types of working groups were formed—three groups that addressed geographically focused issues, and eight groups that addressed topical areas (timber, old growth, prescribed fire, recreation management, travel management, wildlife, range and aquatic issues). All groups were facilitated by the Fort Lewis College Office of Community Services. Working groups recommended ideas to include in one or more NEPA alternatives. Those with wide support would appear in more alternatives, those with fewer advocates in only one. People kept showing up for the study groups. Afterwards, many of them joined the working groups for another six months to a year. Many have gone on to participate in project level analyses and decisions, and volunteering to help with implementation. Participants are also willing to come back to the table after a long hiatus. This effort helped spawn a great deal of public participation in a later Fire Plan effort. A National Monument was recently designated in this area, and though many in the community were opposed, planning for the new monument has been a productive community process in part due to all of the collaborative efforts that preceded it.

The process aims to build knowledge and understanding of issues and the interactions between the community and public land management, along with encouraging commitments to stewardship. The meetings had a roundtable format, and all input was recorded. The process promoted community-based stewardship. When the National Fire Plan came along, the same partners developed community fire plans in the five counties. The plans are very comprehensive, including an integrated Regional strategy, a strong education component, and collaborative mapping of interface areas.

Scope of Case

National Forest level; regional

Themes of Interest

The San Juan Initiative conveners now know how to do the front end, and are still learning how to follow it all the way through to an outcome that incorporates all the perspectives. Once the NEPA work has been done, it should not be used just for that plan or project; agencies need to carry forward what was learned to future issues and decisions. Another suggestion is not to start on the hardest, most complex project. In this community, the process was used on more localized projects first, which led to confidence in the process when it was then applied to the highly complex plan revision.

Local organizations were well positioned with national counterparts. State level environmental groups declined to participate based on request of the local groups, who kept them informed of progress.

County and Ft. Lewis College participation in the convening granted a lot of legitimacy to the process: the college is institutionally neutral, and the county is highly accessible and credible to constituents and to the political chain. Because of the success of the preceding ponderosa pine restoration initiative, this kind of collaborative effort had legitimacy with the local public from the start.

This group tries to stay away from “dueling scientists” and instead builds a common knowledge base and common set of accepted facts. The meeting structure focused on a particular scientific or technical issue; outside experts were brought in to explain the state of scientific knowledge, then facilitated small groups would discuss how it applied to this plan revision. Field trips sometimes followed these meetings, such as one on fire ecology. The eventual intent is for outcomes to be openly monitored to adapt management when necessary.

Key Stakeholders

USDA Forest Service

U.S. Department of the Interior – Bureau of Land Management

State and local agencies

Public stakeholders

Environmental Conflict Resolution Principles Exemplified

- Participants have access to best available information
- Process is voluntary, informal, and flexible
- Process design is transparent to parties
- Neutral facilitation

Results and Accomplishments

The NEPA Section 101 concept of “productive harmony” was discussed during this process. People will take care of the environment and its habitats if it makes sense to them and meets their needs. The community considered providing information on social and economic resources to be their “field work”. A social/economic assessment was drafted, built around productive harmony. It included things not generally included such as the relationship of settlement patterns to public lands, and correlations of changes in the local economy with changes in public land management.

Both the short- and long-term were considered throughout the process, seeking solutions that will benefit future generations. One focus is to understand the trends that are at work, e.g. new development occurring against the Forest boundary - two counties now require fire hazard mitigation plans in order to get approval for subdivisions.

Immediate suggestions for on-the-ground improvements were passed on and implemented. In one example, a request from the District Ranger for people to not use a specific trail, to help the elk during a hard winter, was complied with even without regulation and enforcement. Another example of a pragmatic solution is the manner in which the group analyzed sage grouse management. After all the factors were considered the group realized that it was not cattle grazing that had caused a decline in Sage Grouse, but rather that the brush component had been removed by land managers over the years. This led to trying some reintroduction of sage grouse in likely places as a first step in adaptive management.

Bibliography of Additional Cases

Applegate Partnership. See the National Environmental Conflict Resolution Advisory Committee's Final Report to the U.S. Institute for Environmental Conflict Resolution, April 2005, at <http://www.ecr.gov/necrac/reports.htm>.

Channel Islands Marine Reserve Working Group Case Report. National Environmental Conflict Resolution Advisory Committee's Final Report to the U.S. Institute for Environmental Conflict Resolution, April 2005, at <http://www.ecr.gov/necrac/reports.htm>.

Cape Cod National Seashore. www.nps.gov/caco.

Cape Hatteras National Seashore. www.nps.gov/caha/.

Corridor H Case Report. National Environmental Conflict Resolution Advisory Committee's Final Report to the U.S. Institute for Environmental Conflict Resolution, April 2005, at <http://www.ecr.gov/necrac/reports.htm>.

Fire Island National Seashore. www.nps.gov/fis/.

Glen Canyon Adaptive Management Work Group. National Environmental Conflict Resolution Advisory Committee's Final Report to the U.S. Institute for Environmental Conflict Resolution, April 2005, at <http://www.ecr.gov/necrac/reports.htm>.

Golden Gate National Recreation Area. www.nps.gov/goga/.

Grand Canyon National Park. www.nps.gov/grca/.

Hanford Comprehensive Land Use Plan Case Report. National Environmental Conflict Resolution Advisory Committee's Final Report to the U.S. Institute for Environmental Conflict Resolution, April 2005, at <http://www.ecr.gov/necrac/reports.htm>.

I-73 project in North Carolina and South Carolina. FHWA's Office of Project Development and Environmental Review, Ruth.rentch@fhwa.dot.gov.

Las Cienegas National Conservation Area Project - U.S. Department of the Interior, Bureau of Land Management. <http://www.ecr.gov/necrac/reports.htm>.

Spring Mountains National Recreation Area of Toiyabe National Forest in Nevada. See the National Environmental Conflict Resolution Advisory Committee's Final Report to the U.S. Institute for Environmental Conflict Resolution, April 2005, at <http://www.ecr.gov/necrac/reports.htm>.

Swan Valley Conservation Agreement. See the National Environmental Conflict Resolution Advisory Committee's Final Report to the U.S. Institute for Environmental Conflict Resolution, April 2005, at <http://www.ecr.gov/necrac/reports.htm>.

West Eugene Parkway in Oregon, involved the Federal Highway Administration and the Oregon Department of Transportation as well as local government, federal resource agency and environmental group stakeholders. FHWA's Office of Project Development and Environmental Review, ruth.rentch@fhwa.dot.gov.

Wisconsin Karner Blue Butterfly. See the National Environmental Conflict Resolution Advisory Committee's Final Report to the U.S. Institute. For Environmental Conflict Resolution, April 2005, at <http://www.ecr.gov/necrac/reports.htm>.

APPENDIX C: RESOURCES

This appendix provides a compendium of resources for collaboration and environmental conflict resolution and selected resources on public involvement.

WEBSITES OF FEDERAL ENVIRONMENTAL CONFLICT RESOLUTION PROGRAMS

Council on Environmental Quality – Executive Office of the President. - NEPA Net:
<http://ceq.eh.doe.gov/nepa/nepanet.htm>

Cooperative Conservation: <http://cooperativeconservation.gov/>

Federal Energy Regulatory Commission, ADR Page: <http://www.ferc.gov/legal/adr.asp>

Interagency Alternative Dispute Resolution Working Group Enforcement & Regulatory:
<http://www.adr.gov/civil-enf.htm>

U.S. Department of Agriculture Forest Service, National Partnership Program:
<http://www.fs.fed.us/aboutus/partnership/index.shtml>

U.S. Department of the Air Force Environmental ADR:
<http://www.adr.af.mil/afadr/environmental.htm>

U.S. Department of the Interior

Office of Collaborative Action and Dispute Resolution (CADR):
<http://www.doi.gov/cadr/>

Bureau of Land Management, Natural Resources Alternative Dispute Resolution
(ADR) and Conflict Prevention Partnerships: <http://www.blm.gov/adr/adrNR.html>

U.S. Department of the Navy, Alternative Dispute Resolution: <http://adr.navy.mil/>

U.S. Department of Transportation, Federal Highway Administration, Environmental
Streamlining/Stewardship - Conflict Resolution:
<http://environment.fhwa.dot.gov/strmlng/es2conflict.asp>

U.S. Environmental Protection Agency, Conflict Prevention and Resolution Center:
<http://www.epa.gov/adr/>

U.S. Institute for Environmental Conflict Resolution: <http://www.ecr.gov/>

SELECTED REFERENCES ON COLLABORATION AND ENVIRONMENTAL CONFLICT RESOLUTION

Council on Environmental Quality - Executive Office of the President. *A Citizen's Guide to the National Environmental Policy Act-Having Your Voice Heard*. Under Review. 2006.

Council on Environmental Quality – Executive Office of the President. NEPA Task Force. Compendium of Useful Practices: <http://ceq.eh.doe.gov/ntf/compendium/toc.html>.

Council on Environmental Quality – Executive Office of the President. NEPA Task Force, *Modernizing NEPA Implementation*. September 2003: <http://ceq.eh.doe.gov/ntf/report/index.html>.

National Environmental Conflict Resolution Advisory Committee, Final Report. Submitted to the U.S. Institute for Environmental Conflict Resolution of the Morris K. Udall Foundation. April 2005: http://www.ecr.gov/necrac/pdf/NECRAC_Report.pdf.

Office of Management and Budget and President's Council on Environmental Quality Memorandum on Environmental Conflict Resolution, November 28, 2005: <http://www.whitehouse.gov/ceq/joint-statement.html>.

Reclaiming NEPA's Potential – Can collaborative Processes Improve Environmental Decision Making? O'Connor Center for the Rocky Mountain West, University of Montana; Institute for Environment and Natural Resources, University of Wyoming. March 2000.

U.S. Government Accountability Office Report on Interagency Cooperation: <http://www.gao.gov/new.items/d0615.pdf>.

SELECTED WEBSITES ON PUBLIC INVOLVEMENT

Federal Highway Administration. Public Involvement Techniques for Transportation Decision-Making. <http://www.planning.dot.gov/Pitool/toc.asp>

The International Association for Public Participation. <http://www.iap2.org/>

U.S. Environmental Protection Agency. <http://www.epa.gov/publicinvolvement/>; http://www.epa.gov/publicinvolvement/pdf/eap_report.pdf

U.S. Department of Interior, Bureau of Reclamation. <http://www.usbr.gov/pmts/guide/pi.html>

U.S. Department of Interior, Office of the Secretary. <http://oepr.doi.gov/ESM/ESM03-7.pdf>

APPENDIX D: STRATEGIES FOR PREVENTING CONFLICTS

Challenging and controversial issues arise throughout the NEPA process, many of which ripen into conflicts or are conflicts that can intensify over time. In many instances, these can be anticipated and agencies can prevent unnecessary conflict and take actions to minimize the escalation of conflict when it arises. The following strategies are offered for consideration under a range of potential types of conflicts.

Strategies for Preventing Conflicts due to Differing Missions and Mandates

- Conduct orientation sessions to build mutual understanding of each agency's mission, mandates, and procedures.
- Consider and seek to accommodate each participating agency's procedural requirements.
- Create opportunities for management-level discussions or reviews to distinguish between personal interpretations and agency policies.
- Respect each agency's unique mission and mandate for serving the public interest and, as appropriate, accept joint responsibility to help other agencies fulfill their mandates.
- Create a partnership or team approach to work together to address all aspects of the public interest.

Strategies for Preventing Conflicts Concerning Interpretation of Terms

- Develop jointly derived definitions that can apply across projects.
- Share copies of guidance documents that define the terms.
- Hold joint education sessions conducted by specialists or policy makers.

Strategies for Preventing Conflicts Concerning Information

- Jointly identify key questions that must be addressed (such as anticipated impacts), prior to gathering the information.
- Agree on a methodology to be used for data collection and analysis.
- Respect each other's expertise and the variety of relevant expertise.
- Accept the validation of information by the agency having jurisdictional authority.

Strategies for Preventing Conflicts Arising From Differences in Personality and Communication Styles

- Participate in training to understand different communication styles, issue-processing approaches, and motivational factors. Apply this understanding by becoming more tolerant of differences.
- Become more effective by modifying one's own behavior to be more accommodating of others' styles.
- Build relationships through opportunities for informal conversation and interaction.
- Avoid making assumptions about the motives of others. Examine assumptions before reacting.
- Learn – through training and conversation – about other agencies' cultures and operating styles.

Strategies for Preventing Conflicts Related to Insufficient Agency Resources

- Work to solve problems jointly to make the review process easier and more efficient.
- Prioritize projects so agencies can focus attention where needed.
- Adjust meeting times and venues to accommodate limited staff resources. Use teleconferencing when travel funds are not available.
- Determine resources needed (staffing, GIS mapping) to streamline projects.

Strategies for Preventing Conflicts Caused by Failure to Deliver Timely Comments and Responses

- Clarify each agency representative's level of authority. Seek as much delegation of authority as is practical and appropriate.
- Keep higher levels of authority informed of progress on a project and the rationale for decisions made.
- Use technology as appropriate to expedite reviews (e.g., electronic submissions, teleconferencing, etc.)
- Circulate meeting minutes that are signed off on by all participants
- Establish signed written agreements upon completion of negotiations.

Strategies for Preventing Conflicts Caused by Failure to Fulfill a Commitment

- Clarify each agency representative's level of authority. Seek as much delegation of authority as is practical and appropriate.
- Clarify the level and specific elements of the commitment up front and document, as appropriate. Examine assumptions when a commitment appears to be broken.

- Establish parameters/conditions for revisiting issues, and avoid revisiting unless those conditions are present.
- Keep higher levels of authority informed of progress on a project and the rationale for decisions made.
- Use technology as appropriate to expedite reviews (e.g., electronic submissions, teleconferencing, etc.)
- Circulate meeting minutes that are signed off on by all participants
- Establish signed written agreements upon completion of negotiations.

APPENDIX E: FEDERAL ADVISORY COMMITTEE ACT

What Is The Federal Advisory Committee Act?

The Federal Advisory Committee Act (FACA or Act),⁴⁹ governs the establishment, management, and termination of advisory committees within the executive branch of the Federal government. FACA ensures that these federal advisory committees are accountable to the public by maximizing public access to advisory committee deliberations through open meetings and availability of documents and minimizing the influence of special interests through balanced committee membership. In addition, the Act seeks to reduce wasteful expenditures and improve the overall administration of advisory committees.

Federal advisory committees can significantly strengthen the Federal Agency's collaboration processes. Establishing a Federal advisory committee can be the best approach for achieving NEPA's Section 101 objectives. It also ensures that advice provided to the federal agency is developed through a structured, transparent, and inclusive public process. Agency managers and outside interested parties generally view the advice provided by Federal advisory committees as highly credible due to the thorough vetting and selection process used to ensure balanced membership of the committees, formal opportunities for members of the public to provide written (and oral) public comment, and transparency of the meeting process. While FACA sets up requirements that Federal advisory committees must follow, those requirements generally are similar to the best practices normally used in collaborative processes.⁵⁰

Although FACA has had a profound influence on participation in government decision-making, agencies can be reluctant to form advisory committees under the Act⁵¹. This "fear of FACA" results from confusion about FACA requirements, the perception that it is a time-consuming process to establish a FACA committee and comply with public notice requirements, and the fact that agencies have been directed by Congress, the President and the Office of Management and Budget to limit the number of advisory committees that they are allowed to establish.

FACA Requirements Are Best Practice for Public Involvement

The chart below shows how the best practices of public involvement are similar to the FACA requirements. Requirements relating to balanced representation, transparency of process, clarity of objectives, public access, assessment of need, and others, are best practices in conducting public involvement, as well as FACA requirements.

⁴⁹ 5 USC App. 2

⁵⁰ For more information on federal advisory committees, see the General Services Administration's Committee Management Secretariat's website at: <http://www.gsa.gov/>.

⁵¹ See Rebecca J. Long and Thomas C. Beierle. 1999. *The Federal Advisory Committee Act and Public Participation in Environmental Policy*. Resources for the Future, Washington, DC. <http://www.rff.org>.

Best Practices for Public Involvement	FACA Process
Involves all affected parties	Requires balanced membership § 5
Charge states goals, schedule, resources, members	Charter states objective, scope, funding resources, and estimated number and frequency of meetings § 9
Meetings held in public whenever feasible	Requires open meetings unless Agency head determines that meeting can be closed § 10
Provisions made for public input	Requires opportunity for written public comment and oral public comment when appropriate § 10
Meetings planned and announced in advance	Meetings generally announced 15 days in advance in the Federal Register – GSA Federal Advisory Committee Management Rule 41 CFR § 102-3.150
Meeting summaries open to public scrutiny	Meeting minutes are required and are publicly available § 10
Convening a group involves early contact & assessment with parties	Agencies analyze need & membership when establishing committee
Operating rules are common	Charter may be supplemented with ground rules
Potential conflicts of interest are discussed	Conflict of interest and ethics rule apply to members who are federal government employees (regular or special)

How Does FACA Affect Collaborative Approaches Used In The NEPA Process?

In general, FACA applies to collaborative efforts when all of the following criteria are met:

1. A Federal Agency establishes the group (that is, organizes or forms it) or utilizes an outside group by exerting “actual management or control” over the group;
2. The group includes one or more individuals who are not full-time or permanent part-time Federal employees or elected officials of State, Tribal, or local government or their designated employees with authority to speak on their behalf; and
3. The product of the collaboration is group or collective advice to the Federal agency. (Note that the advice is not required to be consensus advice for FACA to apply.)

Thus, for example, if an agency formed a group that included private interested parties to obtain collective advice on the alternatives that should be included in an EIS, the group would be subject to FACA. If, however, the agency did not seek group advice, but rather the individual advice of the participants, the assembled group would not be subject to FACA.⁵²

How Does The NEPA Practitioner Ensure Compliance With FACA?

⁵² For assistance in determining whether FACA applies to a particular group, contact your agency’s FACA lawyer.

To help agency personnel, including NEPA project managers, meet all of the FACA requirements, the General Services Administration Federal Advisory Committee Management Secretariat issued a final rule that explains how to set up, manage and terminate a federal advisory committee. GSA also provides FACA training several times a year.⁵³ In addition, most federal agencies have developed guidance on FACA management that includes agency-specific processes. FACA requirements that apply to all agencies include the following:

4. Develop a charter and publish notice of the establishment of the committee. FACA § 9. A charter is a two- to three-page document that specifies the mission and general operational characteristics of the committee.
5. Balance the points of view represented by the membership of the committee in relation to the function the committee is to perform.
6. Announce meetings in the Federal Register in advance of the meeting.
7. Open the meetings to the public unless the agency head determines that the meeting can be closed and allow the public to send in or present comments.
8. Keep minutes of each meeting, make committee documents available to the public, and maintain the committee's records for the life of the committee.
9. Appoint a Designated Federal Officer (DFO) to manage the committee.

Are There Collaborative Problem-Solving Activities That Are Not Subject To FACA?

The following processes are not subject to FACA:

10. An agency seeks advice and recommendations from the participants on an individual basis and not from the group as a whole;
11. The group is composed exclusively of federal officials and elected officials from Federal, State, and local governments or tribes (or their designated employees with authority to speak on their behalf) and the purpose of the group is to exchange views, information, or advice relating to issue(s) of intergovernmental responsibility and administration;

⁵³ See footnote 51 for the URL of the Secretariat's webpage which includes a copy of the rule as well as other helpful information on management of federal advisory committees.

12. The group is formed or assembled by a non-Federal entity (such as a non-Federal government, a contractor or a private organization) provided that the group is not actually managed or controlled by the federal government;
13. The purpose of the group is to develop advice for non-Federal entities (such as States or industry sectors);
14. The purpose of the group is to exchange information.

Pre-collaboration *situation assessments*⁵⁴ can assist NEPA managers and staff by providing information to assist the agency in determining whether a collaborative approach should be used, and, if so, what collaboration approach is appropriate. If the selected collaboration effort would be subject to FACA, agency managers and staff should consult with the office in their agency responsible for FACA for guidance on setting-up and operating a Federal advisory committee. If there are any questions as to whether FACA might apply, managers and staff should consult with the FACA attorney in their Office of General Counsel or Solicitor's Office.

Alternatives to FACA-Chartered Groups

Agencies should also consider potential alternatives to establishing a FACA committee in determining the most appropriate approach and procedural framework for convening a collaborative process, depending on the specific situation and desired outcomes.

- Agencies can establish a collaborative working group solely with other governmental entities, e.g., other Federal, State, and local government or Tribal employees working in their official capacities.
- One of the non-Federal entities involved or interested in a NEPA process can take the lead in organizing and setting up a collaborative group. This could be a trusted stakeholder group or an independent, impartial organization or convening group. FACA only applies to Federal agencies. If a Tribe, State, County, or local agency or public interest group puts a collaborative group together, controls membership, sets the agenda, funds the work of the group, and sets up meetings, the Federal agency can participate without violating FACA, providing the Federal members do not manage or control the group.
- In some situations, the Federal agency can form a working group as a subcommittee of an existing committee, such as a Resource Advisory Committee (RAC) or other FACA-chartered advisory committee. Make sure the working group always reports to the RAC or chartered committee and not directly to the Federal agency. In most

⁵⁴ Discussed in "Defining Collaboration", above.

Federal agencies, subcommittees that advise a parent committee rather than a federal agency are not subject to the FACA openness requirements.

- Sometimes group advice is not the desired purpose. It may be that the Federal agency only wants individual advice from public parties. Or sometimes a Federal agency needs to provide information to educate the community about the agency's programs and decisions. In this case, the best approach may be to hold town hall-style public meetings with open public participation and opportunities to respond to questions. Such meetings do not violate FACA as long as the Federal agency is not seeking group advice, but rather is sharing information or seeking advice from individuals.